A COMMENTARY ON MALABAR LAW AND CUSTOM.

BY

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PREFACE.

More than a year ago, Mr. M. Subramania Iyen, Translator of the District Court of North Malabar, placed in my hands four bulky manuscript volumes of decisions on Malabar Law and Custom which he had collected and arranged with considerable labor and research. With this material which he has from time to time supplemented, I undertook the task of compiling a Commentary. To this I have added a short Introduction, descriptive of the country and the people who inhabit it.

The plan of the Commentary is to state as concisely as possible at the commencement of each Chapter the existing law on the subject with which the Chapter deals, and then to support the statement piecemeal by quotations from decided cases and other official sources.

Every attempt thus to reduce unwritten law and custom to propositions must necessarily be imperfect, but I venture to hope that the book will be of use to those who are engaged in administering the law not only as a collection of precedents but as a guide to principles.

In criticizing the decisions of superior Courts, I have endeavoured to avoid a controversial tone and I trust that I have nowhere exceeded the bounds of fair criticism. In conclusion, I wish to

acknowledge the obligations I am under to Mr. M. Subramania Iyen, Translator of the District Court of North Malabar, who furnished the material; to Mr. T. Kunhi Ramen Nayar, late District Munsif of Calicut, now Puisne Judge of the Sudr Court of Travancore, who revised a great portion of the work and made some valuable suggestions; to Mr. Logan, Collector of Malabar, who allowed me to peruse some interesting papers on Malabar land tenures which are to form Appendices to his forthcoming report as Commissioner; to Mr. P. Appavu Pillai, the Record-keeper of the High Court, Appellate Side, who volunteered to correct the proof-sheets for the press and to many other native friends who have assisted me with criticisms and suggestions.

Coimbatore, *August* 1882.

H. W.

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INTRODUCTION.

Even if the materials were available, it would be impossible within the limits of an Introduction to write anything like a History of Malabar. All that I have here attempted is to give a short sketch of the races peculiar to the Province and of their social and political organization. Where I have put forward new theories, I would simply ask that they may be sifted before they are discarded.

The aboriginal inhabitants of Malabar must be looked for among the Cherumars and Poliyars—the slaves of the soil who, until recently, were bought and sold with the land, and among the jungle tribes, such as the Kurumbas, Panniyars and Kurichiyars. These represent respectively the pastoral, agricultural and hunting tribes. They have disappeared from the low country, but representatives of each race are still to be found in the forests of the Wynâd, and the Kurumbas have left their name behind them on the coast.

The first wave of immigration perhaps brought the cultivators of the palm who are known by different names, such as Tíers, Iluvers, Chogans, Shanars. It is commonly supposed that the word Tíer is derived from Dvîpa and signifies an islander, and that Iluvan is derived from Sîlam or Ceylon, but, if so, the names indicate a later period of immigration, as the name by which Ceylon was known to the ancients was Taprobane (Tambraparni) and Lanka.

The next wave of immigration brought the Nayars, which is now the generic name for the Sudras of Malabar. It is commonly supposed that the word Nayar, Nayak, Nayudu, originally denoted the military as opposed to the agricultural division of the Dravidian tribes. The Nayars of Malabar have always been essentially a martial people, and, except in language, have but slight affinity to the

ordinary Tamil Vellalars—the Mudaliyars, the Pillais and the Goundans. Probably, they bear a closer resemblance to the Telugu Reddis.

They appear to have entered Malabar from the north and to have peopled first the Tulu and then the Malayalam country. They were probably the offshoot of some colony in the Konkan or the Deccan. All that can be predicated of them with any degree of certainty is that they were serpent-worshippers, that they practised polyandry, and that their land tenures in common with their other customs point to a distinctly military organization.

Malayalam is the language spoken along the Malabar coast on the western side of the Ghauts or Malaya range of mountains from the vicinity of Chandragiri, where it supersedes Canarese and Tulu, to Trevandrum where it begins to be superseded by Tamil. These are the ancient limits of the Sanscrit Kêrala, *viz.*, from Chandragiri to Kannetti, though in its more comprehensive sense, Kêrala denoted the whole Western Coast from Gokarnam near Goa to Cape Comorin. It has always been a matter of controversy whether Malayalam is the mother or sister or daughter of Tamil. The better opinion seems to be that it is the archaic form of Tamil before it became a written language, and this corresponds with the information we derive from the Greek writers that the country was known by the name of Limurikê, *i. e.*, Tamilikê or the Tamil country.

That the original Nayars were serpent-worshippers is attested by the fact that to this day a form of serpent-worship is maintained in every wealthy Tarwad, and a corner of the compound is set apart for the snakes. Further, we have the tradition that at the time of the Aryan immigration, the country was peopled by serpents or serpent-faced men. Can the Nayars be in any way connected with the Dravidianized Scythians of whom we at present know so little?

All European writers, Lubbock, Mayr, McLennan and others agree in the conclusion that the system of inheritance

in the female line prevalent among the Nayars could only have originated from a type of polyandry resembling free love. The ancient rule was that the woman should remain in her own house and be visited by her husband, and that the eldest female in the house should be the head of the house. Time has brought modifications in the system, and in Malabar, though not in Canara, the eldest female has given way to the eldest male. The wife sometimes has a separate house provided for her, where she lives with her husband. Perhaps no stronger argument could be adduced of the existence of polyandry among the Nayars in ancient times than the fact that to this day the term *Son of ten fathers* is used as a term of abuse among them. And the polyandry must have been of a different type from that which exists among other tribes of Southern India and must have resembled that of the Cis-Himlayan tribes of Newars, Garos and Khasias.

But polyandry may now be said to be dead, and although the issue of a Nayar marriage are still children of their mother rather than of their father, marriage may be defined as a contract based on mutual consent and dissoluble at will. It has been well said that nowhere is the marriage tie, albeit informal, more rigidly observed or respected than it is in Malabar: nowhere is it more jealously guarded or its neglect more savagely avenged.

There are some who would argue that polyandry, if it ever did exist, was introduced by the Brahmins for their own selfish ends, and that the *Kaliyanam* cerenomy which every Nayar girl performs before attaining her puberty, but which has no relation whatever to the real marriage, indicates a period when marriage was, as elsewhere in India, a religious institution. It seems to me that the *Kaliyanam* ceremony was probably introduced by the Brahmins. It is admittedly a mere formal ceremony. By it the so-called bridegroom incurs no liabilities and acquires no rights. I am quite ready to admit that, but for the Brahmins, all traces of polyandry would long since have disappeared, and that

the Brahmins encouraged concubinage between the younger members of their family and the Nayar women for the purpose of maintaining the impartibility of their estates.

The warlike propensity of the Nayars is attested by the employment of implements of war in their household ceremonies, by their isolated mode of living in the midst of fenced gardens and by the establishment in each village or Tara of a *Kulari* or gymnasium where their youth were taught to accustom themselves to the use of arms. Their ballads too are said to teem with stories of the martial achievements of their heroes. I suspect that the Nayar kingdoms of Kolattiri and Vellatri were always more or less independent of the Chera King, and that although the Nayars may have served as mercenary soldiers in the Chera army, they did not really spread southwards to Cochin and Travancore until the extinction of the Chera dynasty in the ninth century.

The third wave of immigration brought the Nambutiris or Brahmins of Malabar. The ordinary derivation of the word Nambutiri is one well versed in the Vedas or more literally "full of wisdom." Another derivation is from a Dravidian word meaning trust or confidence.

The advent of the Aryans probably took place in the first three centuries of the Christian era. The Buddhist missionaries perhaps preceded the Brahmins. Kerala is one of the countries mentioned in the first edict of Asoka. But Buddhism never obtained a firm hold in Malabar, although according to tradition some of the Chera Kings favoured its introduction. Malabar was for centuries a stronghold of Brahminism. Shut off by the long range of the Western Ghauts from other centres of civilization, Malabar soon became a priest ridden country.

The legendary history of Malabar composed by the Brahmins is a mass of anachronisms and inconsistencies. It is impossible to believe that the Brahmins ever acquired

the sovereignty of the country or took to arms as a profession. In the sense in which, as Monier Williams says, the government of all Mahomedan States practically resolves itself into a kind of theocracy of a pattern not unlike that of the Jews under Moses—that is to say, Mahomed and the King are joint rulers—there may have been a theocracy in Malabar. It is not so long ago that a Travancore king solemnly made over possession of all his dominions to his God, and similar acts may have found expression in the *formula*. The Brahmins and the King are joint rulers. In any other sense, the claim of the Brahmins to sovereignty seems to rest on very slender foundations. Possibly, the great Parasu Rama himself was a Nayar, not a Brahmin hero.

The Brahmins appear to have been welcomed by the people of Malabar, though on their first advent in Kolâttanâd they conciliated the inhabitants by adopting the law of inheritance in the female line. It is not unreasonable to suppose that this condition was imposed on the Panniyur Gramam by the Kola King, as it was on the Tiers and afterwards on the Moplas who settled in his dominions.

They founded their Gramams and their Devasams and soon began to exercise a powerful influence in the Council Chamber of the King. The Sudras willingly submitted their females to the embraces of the Brahmins, and the custom of securing Brahmin husbands for the females of the Royal families and petty chieftains of Malabar continues to the present day. It is not too much to say that the intermingling of races has been most felicitous in producing a fine body of men and women. Subservience to the Brahmins has always been one of the chief characteristics of the Nayars, though they arrogate to themselves a position of relative superiority to all inferior castes.

At the present day, there are numerous subdivisions among the Brahmins of Malabar. Below the Nambutiri are the Eliads, the Mussads and the Nambidis. Intermediate between the Brahmin and the Sudra is a class of persons

called Ambalavásis who are employed as Temple servants and known by the name of Warriars, Pisharodis, Nambishans, &c.

Among the west coast Rajahs, there are some who claim to be of Kshattriya origin, and the Cochin Rajah has perhaps some foundation for his claim. It is almost certain that he rose to power on the extinction of the Chera dynasty. The Cherikal Rajah (Kolattiri) and the Travancore Rajah who is a branch of the same family are representatives of the ancient Nayar Kings, perhaps the oldest aristocracy in the world. Similarly the Walluvanad Rajah (Vellatri) is a representative of another ancient kingdom. The smaller Rajahs, if Kshattriyas, are persons who rose to power in the ninth century; if Sudras, are perhaps representatives of the families of old chieftains of the country. The Palghaut Rajah admittedly belongs to an inferior caste of Nayars to which an hereditary taint is said to be attached.

The only indigenous people of Malabar whom I have not mentioned are the Mukuvars or fishermen of the coast, numbers of whom are converts to the faith of Islam.

Of the foreigners of Malabar, it is unnecessary to say much. There are Tulu Brahmins (Embrantris), Concani Brahmins and Tamil Brahmins (Pattars). The last class are especially numerous in Palghaut. There are artisans from the east coast with their subdivisions into guilds of carpenter, goldsmith, brazier, blacksmith and coppersmith. There are the inferior artisans, such as the washerman, the barber, the potter, &c. These complete the list of the so-called Hindus of the Province.

The native Christians may be divided into four classes, *viz.*, the Syrians, the Romo-Syrians, the Roman Catholics and the Protestants. The Syrian Church has been in existence from the early centuries of the Christian era. It was probably founded by Persia and subsequently acknowledged the supremacy of the Patriarch of Antioch. At the Synod of Diamper in 1599, A. D., most of these Churches became

proselytes to the Church of Rome, but the coast Churches alone remained faithful to their allegiance. These form the sect of Romo-Syrians, who are governed either from Portugal or Rome. The Roman Catholics are the descendants of the Portuguese families, who intermarried with the natives of the country and the converts of the Portuguese and Latin missions. The Protestants are the converts made by the Basel Missionaries. The bulk of the native Christians in Malabar belong to this sect, though in Calicut and other towns there is a considerable body of Roman Catholics and on the borders of Cochin a few Romo-Syrians. The bulk of the Romo-Syrians and the Syrians are to be found in Cochin and Travancore.

The Jews whose head-quarters are at Cochin are either white Jews or black Jews, and do not as a rule intermarry. Their numbers are comparatively few and none are to be found in British Territory.

It only remains to speak of the Moplas. Originally the descendants of Arab traders by the women of the country, they now form a powerful community. There appears to have been a large influx of Arab settlers into Malabar in the 9th century, A. D., and the numbers have been constantly increased by proselytism. The Moplas came prominently forward at the time of the Portuguese invasion at the end of the 15th century, A. D.

Let us now see what information can be obtained from the Greek and Roman historians regarding the early settlers in Malabar.

When commerce was almost in its infancy, a trade appears to have sprung up between the Mediterranean ports and the ports of western India. The Phœnicians by way of the Persian Gulf, and afterwards by way of the Red Sea; perhaps the Jews under Kings David and Solomon; the Greeks under Alexander the Great; the Syrians under the Seleucidæ; the Egyptians under the Ptolemies; the Romans under the Emperors; the Arabians after the conquest of

Egypt and Persia; the Italians, more especially the Republics of Venice, Florence and Genoa; the Portuguese; the Dutch; the French, and the English have each in their turn maintained a direct trade with the Indian ports.

The external history of India commences with the Greek invasion in B. C. 327. And if, as is supposed, Pliny's sources of information regarding India were derived from *Megasthenes' Indika,* we have a description of the Malabar coast as it existed more than 2,000 years ago. The following passage from Pliny's Nat. Hist. VI., 21, seems undoubtedly to refer to Malabar.

"Next follow the Nareæ enclosed by the loftiest of "Indian mountains, Capitalia. The inhabitants on the "other side of this mountain work extensive mines of gold "and silver. Next are the Oraturæ, whose king has only "ten elephants, though he has a very strong force of infan- "try. Next again are the Varetatæ, subject to a king who "keeps no elephants but trusts entirely to his horse and "foot. Then the Odombœræ: the Salabastræ: the Horatæ, "who have a fine city defended by marshes, which serve as "a ditch wherein crocodiles are kept, which having a great "avidity for human flesh, prevent all access to the city "except by a bridge. Another city of theirs is much admir- "ed—Automela, which being seated on the coast at the "confluence of five rivers, is a noble emporium of trade. The "king is master of 1,600 elephants, 150,000 foot and 5,000 "cavalry. The poorer king of the Charmæ has but sixty "elephants and his force is otherwise insignificant. Next "come the Pandæ, the only race in India ruled by women. "They say that Hercules having but one daughter, who was "on that account all the more beloved, endowed her with a "noble kingdom. Her descendants rule over 300 cities and "command an army of 150,000 foot and 500 elephants." (*McCrindle's trans. of Megasthenes' Indika, Fragment* 56).

With all respect for General Cunningham, who has attempted to identify the places named in his Geography of Ancient India, p. 495, I venture to make the following sug-

gestions. In the Nareæ, have we not a direct reference to the Nayars of Malabar enclosed by the Western Ghauts? Are not the mines of gold and silver the same mines which after 2,000 years English capital is attempting to work in the Wynâd? Are not the Oraturæ the subjects of the Kola King who still retains the ancient name of Kolattiri? His dominions at that time probably comprised the whole of the Tulu country and North Malabar. In the Varetatæ is there not an allusion to the now extinct Varatatta Rajah, whose palace, I am told, was in the neighbourhood of Taliparamba and whose descendants are still living in Travancore? His dominions were at some period or other absorbed by his neighbour, the Kola King.

May not the Odombœrœ represent the Kurumbas of Kurumbranâd and the Salabastræ the Vallabhas of Walluvanâd? The Kurumbas have disappeared from the coast, but have left their name behind them. They are now to be found in the Wynâd and on the Nilgiri plâteau, and it has been suggested that Kadamba may have been a corruption of Kâdu-Kurumba. The Walluvanâd Rajah is still the Vallabha Rajah (? can this have any reference to the Scythic Vallabhis). His territories formerly comprised the maritime district of Shernâd (Buchanan II. 130) and his subjects were the Vallodis of Walluvanâd, the Nedungadis of Nedunganâd and the Eradis of Ernâd.

In the Horatæ, Charmæ and Pandæ, may we not recognize our old friends Chola, Chera and Pandya? The site of Automela (? *Ettu Mala* or eight hills or perhaps *Attu Mala* or river hill) must be looked for in the neighbourhood of Cranganore, which was always an important emporium of trade, and in the vicinity of which may be found to this day a village called Annanadi (*i. e., Anja-nadi* or the five rivers). The site of the crocodile city is perhaps Tripunatara, the ancient residence of the Cochin Rajahs—the Tropina of the ancient historians. The legend of Hercules and his daughter survives to this day in Kanya Kumari or Cape Comorin.

If my suggestions are correct, there were a number of independent Kingdoms in Malabar, of which Kola was the most important, with its northern boundary at Gokarnam near Goa, and its southern boundary, the river which bounds Kurumbranâd on the north. The Varatatta Raj was perhaps an *imperium in imperio.* The Vallabha Rajah's dominions probably extended as far south as the Ponany river. Then followed a strong Chola Kingdom extending perhaps as far as Alleppey, a small Chera kingdom from Alleppey to Anjengo, and the Pandyan kingdom commencing at Anjengo and stretching round the east coast as far north as the Vellâru river (*Caldwell's History of Tinnevelly, p.* 24). Rivers must be looked for as the boundaries of ancient kingdoms. The old tradition that women cannot cross the southern boundary still exists in North Malabar and among the Nattucottai Chetties of Madura.

Let us see how far these identifications are supported by the internal history of India. We learn from local tradition that Chera, Chola and Pandya all exercised some kind of sway in Malabar, though eventually Chera obtained the supremacy. According to the Sanscrit Puranas, Pandya, Kerala (Chera), Kola and Chola are represented as the four sons of Akrida or Dushyanta, the adopted son of Durvasa, a prince of the lunar line of the Kshatriyas. The limits of Pandya, Chola and Chera were, we know, constantly shifting. On the east coast, Pandya and Chola were constantly fighting for the Hegemony with alternate success. On the west coast, the fighting resulted in Chera establishing its supremacy and in Chola being driven on the other side of the Ghauts.

Our next description of Malabar occurs in a passage in Arrian's Periplus of the Erythræan Sea, written probably in the 3rd century, A. D. The author first describes the country to the south of the Indus which appears to have been known by the name of Ariakê—probably identical with the Larikê of Ptolemy and the Lar of Marco Polo, whence the Brahmins came, and which denotes simply the

country where the Aryans had settled. He also notices two large seats of commerce in the Deccan, and then proceeds to enumerate the ports between Barygaza (Broach) and Limurikê. It is now satisfactorily settled that Limurikê is simply Damirice or Tamilike, *i. e.*, the country of the Tamil speaking people, and as Tamil and Malayalam were then one language, we may place the commencement of Limurikê in the neighbourhood of Mount D'Eli. A long stretch of pirate coast, but little frequented, appears to have intervened between Ariakê and Limurikê and Arrian's list of ports was probably derived from hearsay. The passage to which I wish to call attention is this:—"Then follow "Naoura and Tundis, the first marts of Limurikê, and after "these Mouziris and Nelkunda, the seats of Government. "To the kingdom under the sway of Kêprobotras, Tundis "is subject, a village of great note near the sea. Mouziris "which pertains to the same realm, is a city at the height "of prosperity, frequented as it is by ships from Ariake "and Greek ships *from Egypt*. It lies near a river at a "distance from Tundis of 500 stadia, whether this is "measured from river to river or by the length of the sea "voyage, and it is 20 stadia distant from the mouth of "its own river. The distance of Nelkunda from Mouziris "is also nearly 500 stadia, whether measured from river "to river or by the sea voyage, but it belongs to a different kingdom, that of Pandion." *(McCrindle's translation, p.* 130).

Keprobotras is only another name for the Chera King, whose capital, according to Ptolemy, was at Karura (Caroor). Roughly speaking, the western coast from the Beypore river to Trevandrum was under his sway, and Mouziris, which has been satisfactorily identified as Muyiri-kotta in the neighbourhood of Cranganore, was the capital of his western dominions. At the height of its power, Chera is said to have extended 800 miles, whilst Chola and Pandya only extended 240 and 560 miles respectively. According to Burnell, Chera comprised, besides its western dominions,

Coimbatore, Salem, the Southern part of Mysore, and perhaps Tondamandalam on the east coast. Tundis has been satisfactorily identified as Kadalundi, south of Beypore, and Naoura, I would suggest, denoted the port of the Nayar country, which was apparently still independent of Chera. Nelkunda, which was subject to Pandya, must then be located to the south of Kannetti, the traditional southern boundary of Kerala. Among the articles of commerce enumerated by Arrian is the pepper of Kottanara, *i. e.,* of Kolâttanad.

For the next five centuries, we have but little information of the changes which took place in Malabar. Before the middle of the 8th century, Chera had probably been dismembered of its outlying provinces and had little left but its western dominions. The Konga dynasty was spreading its conquests far and wide. The kingdom of Kola was shorn of its Tulu province, which was annexed to the territories of the Kadamba king of Banavasi. The total extinction of the Chera dynasty took place in 824, A. D., when the last of the Perumals abdicated or was expelled by a popular revolution. Amid the last acts of the Chera king was the erection into principalities of the communities of the Jews and Syrians. At that time we know, from the Jews' and Syrians' deeds, that the country as far south as Quilon (Venâd), Odunâd with its capital at Kayankulam, Ernâd, Walluvanâd, and Palakâd all owned the supremacy of the Chera king.

The disappearance of the last of the Perumals was, as was natural, the signal for the assumption by the Kola king of the Hegemony of the Malabar coast. With its northern branch at Kolâttanad and its southern branch at Trevandrum, the mighty Kolla Swarupam from which the Malabar era derives its name, at first met with but little opposition from the subordinate kings and chieftains. How by degrees the Perimpatap Swarupam of the Cochin Rajahs, the Tripa Swarupam of the Travancore Rajahs, and the Nediyirup Swarupam of the Ernâd Rajahs, asserted their

independence, how the last mentioned Rajah, styling himself Lord of the seas (Tamûdri or Zamorin) by alliances with the Arab settlers and the pirates of the coast, succeeded in subduing the petty chiefs and princes and in extending his dominions in every direction, are matters partly of local tradition and partly of history into which I do not propose to enter at length. In the 12th or 13th century, the Bellal dynasty of Dwarasamudra boasts of having conquered among other nations the Kêralas, though what portion of the ancient dominions of Chera succumbed to them we are not in a position to state.

At the end of the 13th century, we have the evidence of the Venetian traveller Marco Polo that there were separate kingdoms of Coilum, Comari, Eli and Melibar. It has been usual to assume that Coilum must necessarily represent Quilon in Travancore, but I would venture to suggest that the assumption is hasty. The mention of Jews and Christians points to Cranganore, the capital of the Cochin Rajah, and this locality more nearly coincides with the distance of 500 miles from Maaber—the Chola-Pandyan kingdom on the east coast, whose capital was probably Tanjore or Madura. The word Coilum or Kollam, is simply a contraction of Kovilagam or king's palace, and may be equally applied to Cranganore as to many other places. Indeed Dr. Gundert expressly asserts that it was at one time applied to Cranganore. We know that it was applied to Quilandy in Malabar and to Quilon in Travancore. Kolkai in Tinnevelly and Covelong on the east coast are, I submit, simply other forms of the same word. Cranganore was always an important port of commerce, and there seems no reason why it should have given place to Quilon.

Ibn Batuta, who wrote about fifty years later than Marco Polo, informs us that ships from China frequented the ports of Hili, Kaulam and Calicut, which were probably the three ports of Kolattanâd, Cochin and the Zamorin.

The Kingdom of Comari (Cape Comorin) occupied the extreme south of the Peninsula, and perhaps included

Kolkai and Kayal on the east coast. Five centuries later, we have the evidence of Fra San Bartolomeo that the kings of Travancore had hitherto been insignificant princes, whose territories extended only about fifteen or twenty miles up the country from Cape Comorin. It was under the able generalship of D'Lanoy that Travancore, in the latter half of the 18th century, succeeded in subjugating or perhaps recovering possession (after an interval of many centuries) of nearly the whole of its present territory. Quilon (the ancient Venâd), Kayankulam (the ancient Odunâd), Tekkankûr, Vadakankûr, Porca and other petty chieftains were forced to acknowledge the superiority of European armaments. (Cf. Day's Cochin, p. 47).

The Kingdom of Eli is satisfactorily identified with Mt. D'Eli, the capital of the ancient Kola king or Kolattiri, and Melibar probably represented the newly founded kingdom of the Zamorin with its capital at Calicut. At the end of the 15th century, A. D., the Portuguese found the Zamorin at the zenith of his power. Had they succeeded in forming an alliance with him, how different might have been the course of events. The history of the Portuguese in India is simply a record of wars nominally waged for the sake of religion, but really in order to secure a commercial basis. The aggrandizement of the Zamorin at the expense of his neighbours had made him a conspicuous object of jealousy. By the aid of the Moplas, he had risen to power and, in alliance with them, he was determined to stand or fall. With the assistance of the Cochin and Travancore kings, the Portuguese held their own against the Zamorin, but their successes were short-lived, and in the middle of the 17th century, they were obliged to surrender their Cochin conquests to the Dutch and retire to Goa. Then followed wars between the Dutch and the Zamorin—the invasions of Malabar by Hyder Ali and his son Tippoo, in the 18th century, A. D., and the final cession of Tippoo's Malabar possessions to the English in 1792, A. D., followed by the expulsion of the Dutch.

The warlike spirit of the people, fostered by three centuries of fighting, was not curbed without difficulty. Even in the present day, though the Nayar has become a peaceful citzen, the fanaticism of the Mopla is wont to assert itself on the slightest provocation.

From the earliest times, perhaps before the Aryan immigration, there appears to have been a complete military organization among the Sudras of Malabar. The unit was the Dêsham presided over by the Dêshavali. A number of Dêshams constituted a Nâd which was presided over by a Nâdvali or local chieftain who again was subject to the Rajah. Tradition divides the whole coast from Gokarnam near Goa to Cape Comorin into 17 Nâds, but at the time of Hyder's invasion of Malabar in 1765, there appear to have been 28 Nâds in Malabar proper, exclusive of the Tulu country, Cochin and Travancore. The Chief Rajahs in Malabar proper were the Kola king (Kolâttiri) and the Zamorin of Calicut (Tamûdri). The subordinate Rajahs were the Cottayam, Kadattanâd, Kurumbranâd, Beypore or North Parapanâd, South Parapanâd, Walluvanâd (Vellatri), Palakâd, Betutnâd and Chavakâd (Poonatur).

Some of these subordinate Rajahs were simply Nâdvalis who had waxed stronger than their neighbours but all acknowledged the suzerainty of Kolâttiri or the Zamorin. It would be possible in the present day to obtain a list of some sixty Nayar families whose ancestors were originally Nâdvalis or Dêshavalis and whose social prestige is still recognized.

The Malabar Rajah derived his revenue not from a share of the produce, but from demesne lands, escheats, customs and a poll tax on foreigners. At the same time, tradition points to a period when a sixth share of the produce was paid as a kind of protection fee to a constituted body of Police. Possibly, this fee was only paid by foreign settlers, possibly, it was paid to the Chera potentate so long as the Malabar Rajahs acknowledged his supremacy

and was discontinued after his disappearance. Information on this subject is very scanty.

Side by side with the military organization was a more or less complete civil organization of which the unit was the Tara. The Tara was the village community of Sudras owning lands in common and presided over by its elders (Karnavar) who met together in assembly (Kúttam). The constitution of the Brahmins was not dissimilar. The Gramam was the village community and its affairs were managed by the Sabhayogam or council of elders. The custom of cultivating fields in rotation, which is not yet extinct, is a relic of the ancient system of corporate ownership and periodical re-distribution of fields.

The first break-up of the Tara was probably the separation of the King's family (Kovilagam) from the community. In process of time, the Taras split up into Tarawâds, each presided over by a Tara-pâd or head of a family. And as among the Sudras the village communities merged into joint families, so among the Brahmins the Gramams merged into Patriarchal families. Corporate ownership passed from the larger unit of the village to the smaller unit of the family. And at the same time there was a tendency to merge the civil in the military organization. Hence arose a kind of feudal relation between the Rajah or Nâdvali, who had ripened into an individual owner of property, and the Tarawâds. In other words, the rent service which all were bound to render in time of war to the military chief was gradually commuted into a rent charge.

The Rajahs and petty chieftains became landlords: the Nayars became tenants with perhaps a permanent right of occupancy. Where the actual cultivator under the Devasams and the Brahmins was exempt from military conscription, a system of Landlord and Tenant was probably introduced at an earlier period and, whatever the theory may have been, the practice was to retain the same tenant so long as he improved the land and paid the rent.

PART I.

THE FAMILY.

Chapter I.—Partition—Inheritance—Adoption.

Chapter II.—Rights and Obligations of Karnavan.

Chapter III.—Removal of Karnavan.

Chapter IV.—Alienations by Karnavan.

Chapter V.—Separate and Self-acquired Property.

PART I.

CHAPTER I.

Partition—Inheritance—Adoption.

In the management and assignment of property, the customs of the Malabar Brahmin do not differ from the customs of the Malabar Sudra. Impartibility is the rule prescribed and community of interest can only be severed by voluntary separation and partition. In order to maintain the rule of impartibility among the Brahmins, it is customary for the eldest only of several brothers to marry whilst the younger brothers are permitted to form temporary alliances with Sudra women. The offspring of such marriages are members of the Sudra family. The only difference between the Brahmin and the Sudra is that the former, with the single exception of those belonging to the Payanoor Gramam in North Malabar, follow the *Makkatayam* (descent by sons) system of inheritance, whilst the Sudra follows the *Marumakkatayam* (descent by nephews) system. The Moplas and Tíers of North Malabar have also adopted the *Marumakkatayam* system. Questions of inheritance can only arise in the case of separate and self-acquired property. Those who are members of the same family are said to be connected by

Mudal Sambandham (community of property), whilst those who were once of the same family and have separated from one another are said to be connected by *Pula Sambandham* (community of pollution). On failure of the former class who are termed Anandravar, the latter inherit and are termed *Attaladakam* heirs.

There are said to be three kinds of adoption in use in Malabar.

(1). Adoption by ten hands, *i. e.*, by the hands of the adoptors (male and female), the adoptee, and the adoptee's parents or guardians. In the case of those following the *Marumakkatayam* system of inheritance, the adoptors will be the *Karnavan* and the senior female in the *Tarwad*, whilst the adoptee's guardians will be his *Karnavan* and mother. This form of adoption is very rarely used except in Brahmin families, and the boy selected is usually one on whom the *Oopanayanam* ceremony has not been performed. It is probably almost identical with the ordinary Hindu adoption.

(2). Adoption by *Chamatta*, *i. e.*, by burning a pan of a sacred grass.

(3). Adoption by taking into the family.

The last is the form commonly adopted by Brahmin widows and Sudras for the purpose of perpetuating the family when it is in danger of becoming extinct. There is no limit as to age or number of persons adopted. The only limit seems to be that the person or persons adopted should be of the same *Vamsham* or tribe as the adoptor. Among Sudras,

the adoption should be of one or more females, but it is frequently accompanied by the adoption of a male for the purpose of providing for the future management of the adoptor's property. Sometimes a whole family of adults is adopted.

Whatever religious motive may be attached to the first two modes of adoption, the third mode appears to be based on entirely secular motives and to be closely akin to the *Kritima* form of adoption which is still in force in the Mithila country (cf. Mayne's Hindu Law, § 182 to 187).

In selecting an heir for adoption, preference should be given to the distant kindred, but it is doubtful whether this is more than a moral precept. Notice should also be given to the Ruling power. Whether the Ruling power might in the case of a person whose property would escheat for want of heirs place a veto on the adoption is a question which has never yet been decided.

Among the Brahmins, there is another form of perpetuating the family by the affiliation of the son-in-law which is called *Sarvasaḍanam*. The son-in-law succeeds to the management in trust for the issue of his marriage. If there is no issue, the property reverts to the nearest heirs. This custom seems to be a relic of the *Putrikaputra* or son of the appointed daughter and to recal a period when the daughter and the daughter's son were not in the line of heirs.

(1). Impartibility is the rule prescribed and community of interest can only be severed by voluntary separation and partition.

In 1810, the Provincial Court of the Western Division held that the individual share of a member of a *Marumakkatayam* family was liable to be sold for debts contracted by him; that if partition was made, it must be *per stirpes* and not *per capita* and that the *Karnavan* was not entitled to a larger share than any of the other members. The Judges in their circular Proceedings of 28th May 1810, say:—

"As this decision may possibly instigate the younger "branches of the Nayar families to demand a partition of the "property of the family to which they belong, it is necessary "to observe that the Nambudries examined as above seem "to admit with reluctance the possibility of the occurrence "of any circumstances that should call for a partition of "family property or any deviation from the immemorial "usage in Malabar which vests in the senior male of each "family the management of the property in trust for the "support and other expenses of the rest. Any application "therefore for such division or for any individual share "should be received with much circumspection and, no one, "unless he be either the representative or a co-representa-"tive of a branch of the family, should be considered as "entitled to demand such a partition."

In 1813, the same Provincial Court decided that the *Marumakkatayam* law did not admit of a division of family property and this decision was confirmed by the Sudr Court in A. S. 28 of 1814. (I. Sud. Dec. 118).

I extract the following passage from an opinion given by the Sudr Court Pundits on 19th January 1854.

"Among the Brahmins of Malabar, there is no occasion "for the division of the family property, it being customary "among them, that the eldest brother alone should marry, "that his younger brothers should remain unmarried, and "that his descendants alone should perform their obsequies

"and become their heirs. If, however, a younger brother "should marry, there can possibly be no reason why he "should not be allowed the share of property he is entitled "to by the Hindu Law, since his issue would be separate "and distinct."

The latter part of the opinion is clearly erroneous.

In S. A. 4 of 1857, the Sudr Court (Morehead and Goodwyn, J. J.) following the decision in A. S. 28 of 1814, reversed the decrees of the lower Courts. (Sud. Dec. 1857, p. 120).

In A. S. 219 of 1856 (Calicut) Mr. Cook as Sub-Judge says:—

"To constitute a valid division of the *Tarwad* property, "local usage demands that all the members of the *Tarwad* "are aware of and consent to the contemplated division" (Zillah Dec. Calicut, 1856, p. 19).

In A. S. 203 of 1855 (Tellicherry) Mr. Chatfield says:—

"The assertion of a division being opposed to Hindu "Law where the rules of *Marumakkatayam* prevail is not true, "as the heirs by mutual consent and agreement, as in the "case here, have full authority to effect a partition of the "family estate." (Zillah Dec. January 1857, p. 15).

In A. S. 36 of 1860 (Tellicherry) Mr. Holloway held that partition among Brahmins was wholly alien to the principles of tenure in Malabar.

In S. A. 83 of 1862, the High Court (Frere and Holloway, J. J.) had before them a case from Canara in which the right of a female to division was set up. Mr. Justice Holloway, in delivering Judgment, says:—

"It has not been disputed, as indeed it could not be, "that the compulsory division of the family property is "wholly opposed to the authorities upon which the *Aliya* "*Santana* system of inheritance rests. It is equally opposed "to the principle of that system which vests the property in "the females of a family. This system of inheritance differs

" only from that of Malabar in more consistently carrying " out the doctrine that all rights to property are derived " from females. If this indisputable rule had been abrogated " by decisions of the highest Court of appeal upon the " question distinctly raised before it, how much soever I " should have lamented that Judges had overstepped their " proper duty of declaring law, I should, as in the case of " Hindu wills, have followed such decisions. Here, however, " the only decisions produced are those of inferior Courts, " evidently influenced by their views of expediency in the " particular case before them, and still more singularly " decisions in which, while violating the law, those Courts " have admitted its existence. Decisions dividing family " property have also been passed in Malabar, and it is one of " the claims of our late colleague, Mr. Justice Strange, " upon that respect which we all feel for him, that he " successfully resisted the attempts of lower Courts, also " acting upon their own views of expediency, to introduce " foreign admixtures into a law of which, whatever may " be thought of the policy, none can deny the consistency " with the theory upon which it is based." (I. Mad. H. C. Rep. 380).

Difficult questions not unfrequently arise whether, when a *Tarwad* has for many years been separated into branches, community of property (*Mudal Sambandham*) as well as community of pollution (*Pula Sambandham*) still exists between them. The subject is dealt with in R. A. 120 of 1870. The plaintiffs sought for a declaration that they were members of defendants' *Tarwad*. The defendants contended that though descended from a common stock, their and plaintiffs' *Tarwad* were distinct. The Civil Judge (Mr. Carr) found in favor of plaintiffs. On appeal, certain issues were referred for trial and Mr. Sharpe found that no community of interest existed between plaintiffs and defendants or in other words that they belonged to different *Taverais* possessing a right to the separate enjoyment of property.

The High Court (Holloway and Innes, J. J.) upheld Mr. Sharpe's findings. In his Judgment Mr. Holloway says:—

"As in all Hindu Law, so in the archaic form of it "which exists in Malabar, the first conception of a family is "of an indissoluble unit, a mere aggregate with no separate "rights, living under one head, united more especially by "their connexion with the same *sacra*. In Malabar, as "elsewhere, the inconvenience of this state of things has "made itself felt and families becoming very numerous, "have split into various branches, have in fact become new "families."

"The common speech of the people is the best evidence "of customary law and when they speak out of Courts of "justice, they are often truthful enough. Every man who "has conversed much with Malayalis must have heard the "very common expression in answer to the question—Is "such a man of your *Tarwad?* There is community of "purity and impurity between us but no community of "property. In one sense of the word, people so related are "still of the same *Tarwad*. In the only sense with which "Courts of justice are concerned, they are not. Where "there are several houses bearing the same original *Tarwad* "name but with an addition, and there is no evidence of "the passing of a member of one house to another, there is "the strongest possible ground for concluding that the "separation has taken place."

* * *

"It seems to me that the evidence shows precisely the "case of severance which I have described. One of the "several branches having become better off than another, "that other, by virtue of the ambiguity of a word, is seeking "to reap that which it has never sown and to which, on the "true understanding of the customs of the people, it is "wholly unentitled. I would declare that the Plaintiffs "and Defendants were originally of the same *Tarwad*, but

"that there has ceased to be community of rights of pro-"perty between them."

In one case that was before me (A. S. 15 of 1879) I held that separation for two generations, that is for sixty years, was good presumptive evidence of a division. And I apprehend that complete separation for one generation, that is for thirty years, would be sufficient to throw the burden of proof on those who alleged community of interest.

In A. S. 78 of 1878 (North Malabar) the Sub-Judge held that forty years' separation was sufficient, and his decree was affirmed by the High Court in S. A. 55 of 1879.

Further, it appears to be the rule that persons claiming membership in a *Tarwad* in which they were not residing, must prove that they were descendants of the mother, grand-mother, or great grand-mother of some of the existing members.

That was the opinion of the Principal Sudr Amin of Tellicherry (Krishna Menon) in O. S. 17 of 1868 (S. A. 344 of 1871).

(2). Questions of inheritance can only arise in the case of separate and self-acquired property.

When one member of a family separates from the *Tarwad* and receives his share of the common property, he thereby forfeits all rights to the property so long as a single member of the *Tarwad* survives. This was laid down by the Provincial Court of the Western Division in O. S. 24 of 1825.

In A. S. 285 of 1855 (Calicut) which was a suit brought to set aside the sale of a *paramba,* it was found as a fact that the alienor was the last member of his *Tarwad,* and that he had an absolute power of alienation which could not be called in question by a *Dayadi.* Mr. Holloway as Sub-Judge says :—

"Mere collateral relations may succeed to property "unalienated, but their non-consent will be no bar to alie-

"nation" (Zillah Dec. 1857, p. 6). And the same principle was affirmed in A. S. 305 of 1855 (Calicut) by the same Judge. (Zillah Dec. 1857, p. 18).

In A. S. 2 of 1871 (Tellicherry) which was confirmed by the High Court in R. A. 120 of 1872, it was held by Mr. Reid that mere similarity of name was no evidence *per se* of a right of inheritance.

In O. S. 17 of 1868 (S. A. 344 of 1871) and in O. S. 19 of 1872 (R. A. 69 of 1873), the Principal Sudr Amin (Krishna Menon) distinguished between the two classes of heirs, those who claimed as descendants of the mother, grand-mother and great grand-mother of a deceased person, and those who claimed from more remote female ascendants. He would apparently treat the first class as Anandravans, and the second class as *Attaladakam* heirs or *Dayadis*, but the solution of this question would of course depend on whether the members were or were not separated in interest. The distinction is, however, analogous to the distinction between the nearer and remoter *Sapindas* under Hindu Law.

The *Karnavan* of a *Tarwad* takes by inheritance on behalf of himself and the other members of the *Tarwad* to which he belongs.

(3.) There are said to be three kinds of adoption in use in Malabar. * * * *

Whatever religious motive may be attached to the first two modes of adoption, the third mode appears to be based on entirely secular motives.

In 1808, the Provincial Court of the Western Division upheld the adoption of two females and a male in a Nayar family, and decided that the adoptees were entitled to be maintained in the adoptor's family. This decision was confirmed by the Sudr Court in S. A. 37 of 1808.

Again in A. S. 21 of 1814, the Provincial Court upheld the adoption of a single female who stood in a considerably more distant degree of consanguinity as heir than others. Yet in A. S. 236 of 1858 (Tellicherry) Mr. Holloway speaks

of "the singular and unheard of process of a Nayar adoption," and again in A. S. 183 of 1861 (Tellicherry) the same Judge speaks of "the ludicrous absurdity of adopting a nephew."

In A. S. 233 of 1862 (Tellicherry) Mr. Sullivan held that adoption must be of a female and not of a male. But in A. S. 70 of 1873 (North Malabar) Mr. Logan upheld the adoption of a male and female, and his decision was confirmed by the High Court in S. A. 19 of 1874. And in A. S. 69 of 1873 (North Malabar) Mr. Reid upheld the adoption of one male and four females, but his decision was reversed by the High Court in S. A. 553 and 571 of 1876 on the ground that a declaratory suit would not lie.

In A. S. 75 of 1872 (North Malabar) the Sub-Judge (Krishna Menon) held that the adoptees should be selected from among the *Attaladakam* heirs, but that this was rather a moral precept than a legal obligation and that selection of a stranger was not invalid. He, however, lays down that in the latter case (and apparently in the latter case only) the adoption must be made before the girl's marriage, and that her brother might be adopted at the same time. I do not know whether the limitation as to age rests on any good authority.

All the cases quoted are from North Malabar, and it is very rare that any case of the kind arises in South Malabar.

One case did incidentally come before me on one occasion, but not so as to require a decision. It may with confidence be asserted that the system of Nayar adoption is undoubtedly consistent with the usage of Malabar. The family of the Travancore Rajah would have long ago been extinct but for the adoption of females to perpetuate the succession.

In Canara, it has been held that the female *Ejaman* or manager could not adopt if she had male issue living (Sud. Dec. 1859, p. 138); but it is the absence of female, not of male, issue that would render the family liable to extinction, and I doubt the soundness of this decision. Among the Nambudries the system of introducing male heirs when the

family is in danger of becoming extinct, exists, but it is difficult to say whether the Courts would recognize such a custom when the family is represented solely by females.

In A. S. 36 of 1855, the Sudr Court (Hooper, Macleod and Strange, J. J.) had before them a case of disputed succession in a Nambudri *Illam*. Their Judgment is as follows:—

" It appears agreed upon by both parties that the " Kypanjeri *Illam* vested in Savitri, that in order to con- " tinue succession in the *Illam*, she, according to a custom " of the caste of Nambudries, introduced the defendant's " father to beget a son in and for the *Illam*; that he " accordingly contracted a marriage, the fruit of which was " a son named Kellan, and that the property then vested in " the said Kellan, but on his death without issue reverted to " Savitri. The senior Pundit who was present at the " hearing of the suit, has viewed the introduction of Kellan " into the family as that of a son obtained by gift, and the " succession to him of Savitri in the light of his adoptive " mother. Kellan, the Pundit explains, coming in thus " as a gift, was cut off from alliance with his natural " kindred. The claim of the defendants to succeed as his " half brothers is hence found to be an inadmissible one.

" The defendants still claim as the nearest relations of " Savitri's husband, but as the Civil Judge has preferred " the evidence offered in support of the plaintiff's preten- " sions as nearest of kin, this plea the Court of Sudr Udalat " observe has been definitely disposed of." (Sud. Dec. 1855, p. 125).

In R. A. 52 of 1861, the Sudr Court (Strange and Frere, J. J.) recognized the adoption of two males, aged 3 and 6, by the widows of the eldest member of a Nambudri *Illam* with the consent of the managing member who, according to the custom of the country, was unmarried. The suit was by the widows to get rid of the adoptees who had lost caste, and the Sudr Court does not appear to have dealt with the questions of law raised by the appeal. They found that there was an

adoption in fact, that it had been acted on for many years, and that it was not open to plaintiffs to question its legality. (Sud. Dec. 1862, p. 59).

In A. S. 253 of 1871 (S. A. 474 of 1872) the question was treated as one that depended entirely on the Hindu Law of adoption.

In A. S. 723 of 1877 (South Malabar) I held that probably the adoption of a sister's son in the family of a Malabar Brahmin was invalid, but treated the adoptee as a testamentary heir. My decision was confirmed on appeal in S. A. 297 of 1878.

In A. S. 429 of 1878 (North Malabar) the Sub-Judge held that the adoption of a sister's son among Nambudries was invalid, but that matters had gone so far that it was inequitable to allow the claimant (heir by appointment) to set up the rule of law. But in S. A. 252 of 1880, the High Court held that there was no estoppel and sent back an issue for trial as to the custom.

In A. S. 364 of 1881 (South Malabar) I had before me a case in which the widow and daughter of a Nambudri had alienated the whole *Illam* property to the widow's brother's son, in consideration of his promise to marry a wife and raise up heirs to the *Illam* and to maintain the female members till death. The daughter sued to set aside the alienation. I held that the daughter had not proved that her and her mother's consent to the agreement was obtained by fraud; that defendant had evaded performance of his promise, but that plaintiff had waived her right to have the agreement rescinded on this ground; that the agreement was void as contrary to public policy, but that plaintiff being *in pari delicto* could not sue for its rescission. On appeal (S. A. 679 of 1880) the High Court affirmed my decree. Mr. Justice Innes agreed with me on all points, but Mr. Justice Kindersley held that if plaintiff and her mother were not, as apparently they were not, in the position of ordinary Hindu widows, there was nothing opposed

to public policy in their disposing of the property, as being the last owners and competent to dispose of it absolutely. (I. L. Rep., III. Mad. 215).

When the question arises as to the nature of an estate of a Nambudri widow, it will no doubt be a most interesting one. It is, I believe, a fact that not a single estate of a Nambudri has ever escheated to Government, and yet, in consequence of the rule that only the eldest son is entitled to marry, the families of Nambudries are constantly becoming extinct. They are usually taken possession of by some one claiming as *Dayadi.* May it not be that the system of adopting adults among Nambudries and Nayars is a relic of the ancient *Kritima* form of adoption, which is described by Mr. Mayne in his work on Hindu Law, Secs. 182 to 187. That system is still prevalent in Mithila.

Assuming the right of a Nambudri widow to appoint an heir to the *Illam,* a question would then arise whether the sanction of the Ruling power is a condition precedent to the exercise of that right. That sanction ought to be applied for is shown by the deeds (50 to 53) collected in the Appendix to Mr. Logan's forthcoming report as Commissioner.

Another custom among the Nambudries which has been judicially recognized, is that of the *Sarvasadanam* marriage, and this certainly seems to me to be a relic of the old *Putrika putra* (son of the appointed daughter).

There is a general impression on the Western coast among those who follow the rule of descent by sons, that the daughter's son is not in the line of heirs.

In A. S. 10 of 1817 (Sudr Court) which was a suit between Chetties, the witnesses agreed in deposing that, according to the usages of the caste, adoption was necessary to constitute the sons of daughters lawful heirs to their grand-father. (I. Sud. Dec. 157).

In A. S. 123 of 1877 (South Malabar) which was a suit between Putter Brahmins, a divided brother set up a claim to inherit in preference to the daughter and the daughter's son.

In accordance with the prevailing opinion when a Nambudri *Illam* is in danger of becoming extinct, it is a common practice to perform a *Sarvasadanam* marriage, by virtue of which, at the death of the father, the whole estate is placed under the management of the son-in-law in trust for the lawful issue of his marriage.

Whether the interest of the son-in-law is, in the absence of a provision to the contrary, divested by failure of issue of the marriage, is a question on which there is no conclusive decision. In two cases in South Malabar, I held, mainly on the authority of what the old Vakils stated, that the son-in-law's personal interest ceased on failure of issue.

In A. S. 810 and 811 of 1880 (South Malabar) the *Sarvasadanam* marriage was accompanied by the formal appointment of the son-in-law as heir to the *Illam*, and he entered upon his duties as head of the *Illam* after the appointor's death, his position further being recognized by the nearest *Dayadi*. On these facts I held that the son-in-law was, on failure of issue of his marriage, the lawful heir, and my decision was affirmed by the High Court in S. A. 247 of 1881.

In another case (A. S. 794 of 1879) the marriage of a sister in the *Sarvasadanam* form was set up, but I found against the validity of the custom and my decree was confirmed by the High Court in S. A. 398 of 1880.

CHAPTER II.

Rights and obligations of Karnavans.

THE senior male member in a Malabar family is by law the Karnavan, and as such is the natural guardian of every member within the family. He alone can sue and be sued as the representative of the family. In the absence of fraud or collusion, a decree against the Karnavan as such is binding upon the other members of the family, although they are not parties to the suit. The Karnavan for the time being has an almost absolute control over the distribution of the family income and the family expenditure. The Karnavan may delegate his powers of management, but he cannot, without the assent of those to whom the obligations are owing, *i. e.*, the members of the family generally, assign his rights and privileges so as to be unable to resume them. His powers of management may, however, be limited by contract.

As an exception to the general rule, in some few Sudra families, a custom exists by which the management is vested in the senior female in preference to the senior male member of the family. Such a custom, however, must be strictly proved.

The rights of the junior members of a Malabar family are the right of the males to succeed to the headship by seniority, and the right of the males and females to be supported in the family house. A

separate maintenance will not be allotted to a junior member who voluntarily and without lawful excuse separates himself or herself from the family.

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(1). The senior male member in a Malabar family is by law the Karnavan, and as such is the natural guardian of every member within the family. He alone can sue and be sued as the representative of the family.

In a Judgment delivered by the Provincial Court of the Western Division in 1813, which was affirmed by the Sudr Court in A. S. 28 of 1814, the Court (Stevens and Clephane, J. J.) say:—

" In cases where the *Marumakkatayam* Rule of inherit-" ance prevails, the property is considered indivisible—the " management thereof and the collection of the rents and " income being invariably vested in the *senior male,* on " whom devolves the duty of providing for the support and " maintenance, as far as the funds will admit, of the other " branches of the family, especially of the women and chil-" dren." (I. Sud. Dec. 118).

In his Report as Special Commissioner on the affairs of Malabar, dated 25th September 1852, Mr. Strange writes:—

" The theory of a Hindoo family in Malabar is that the " head thereof has entire control therein, that his signature " alone can be taken for any exigencies of the family, for " the due support of the whole of which he is responsible, " and that the property is vested in him for the common " good of all and is indivisible."

This opinion was endorsed by Mr. Conolly, the Collector of Malabar, in his letter to Government of 8th October 1853.

In a Judgment delivered by the High Court (Morgan, C. J., and Holloway, J.) in R. A. 34 of 1876, it is said:

" The person to whom the Karnavan has the closest " resemblance, is the father of a Hindu family. Like him,

" his situation as head of the family comes to him by birth.
" * * * * The office is not one
" conferred by trust or contract, but is the offspring of his
" natural condition." (I. L. Rep., I. Mad., 153).

And in his standard work on Hindu Law, Mr. Mayne writes:—

" In Malabar and Canara where the property is indis-
" soluble, the members of the family may be said rather to
" have rights out of the property than rights to the pro-
" perty. The head of the family is entitled to its entire
" possession and is absolute in its management. The
" junior members have only a right to maintenance and
" residence. They cannot call for an account, except as
" incident to a prayer for the removal of the manager for
" misconduct, nor claim any specific share of the income,
" nor even require that their maintenance or the fair outlay
" should be in proportion to the income. An absolute dis-
" cretion in this respect is vested in the manager." § 264.

Congenital blindness deafness or dumbness, which would prevent a Karnavan from attending to his duties, incurable disease, such as leprosy, which would prevent him from having social intercourse with his neighbours, and insanity, are causes which disqualify a member of the family from succeeding to its headship, as they are causes which exclude a man from inheritance under Hindu Law.

There are cases which go to the length of saying that a spendthrift and an incompetent person may be excluded from the post of manager. But it is difficult to see how such matters could be settled otherwise than by a suit for the Karnavan's removal.

In A. S. 88 of 1878, the question was raised before me whether, in the absence of male adults, the management of the *Tarwad* would devolve on the senior female or on the mother of the minor adult male as his guardian. I decided, and I think rightly, in favor of the former, but a contrary

conclusion was arrived at by the Sub-Judge in a similar case. The High Court had the matter before them in S. A. 346 of 1878 but refused to decide it.

That the Karnavan is the natural guardian of every member within the *Tarwad* was held by the High Court (Morgan, C. J., and Holloway, J.) in Civil Misc. R. A. 406 of 1872. The Judgment says :—

" In the present case, by the principles of the law of " Malabar, the mother herself while alive and her children " too were under the guardianship of the head of the family, " the Karnavan. Their position was precisely analogous to " that of the members of a Roman family under the *patria* " *potestas*. The Karnavan is as much the guardian and " representative for all purposes of property, of every member " within the *Tarwad*, as the Roman father or grand-father.

" Moreover the relation of husband and wife does not in " Malabar disturb their condition. These children have no " claim whatever upon the property of their father, but their " rights are entirely in that of their Karnavan's family. " There is no doubt at all that he was during the mother's " life-time, and continues to be after her death, the legiti- " mate guardian of these children, and that the father has " by positive law not the smallest right to their custody." (VII. Mad. H. C. Rep., 179).

As to the right of the Karnavan to decide what family ceremonies, are and what are not obligatory, I would refer to a Judgment of my own in A. S. 541 of 1879 (South Malabar). I held that *primâ facie* the managing member is the proper person to determine the question, and that junior members could only dispute his authority if the non-performance of the ceremonies involved social disgrace. My decision was confirmed by the High Court in S. A. 117 of 1880.

The Karnavan is *primâ facie* the only person who can represent the family in suits. As remarked by Mr. Holloway in his Judgment in A. S. 120 of 1862 (Tellicherry), " a

" Malabar family *speaks* through its head and in Courts of " justice except in antagonism to that head can speak in no " other way."

If a decree is obtained against the Karnavan, it will, in the absence of fraud or collusion, bind the other members. This has been recently decided by the High Court (Kernan and Kindersley, J. J.) in S. A. 262 of 1880. After discussing the position of the Karnavan of a Malabar family (in this case it was a Nambudri family), and expressly ruling that a Karnavan is not a mere trustee and that the Rules of Courts of Equity as to the necessity of making *cestui-que-trusts* parties to suits against trustees by strangers are inapplicable, the Judgment concludes:—

" In Suit 2 of 1875 the Karnavan was sued as Karna- " van and defended on the ground that the land was the " *jenm* of his *Illam* or *Tarwad.* He was not sued in his " individual capacity, and the *Kanom* under which it was " decided he held the lands was granted to a former Kar- " navan and came by descent to be managed by him. It " appears to us that Appellant claims within the meaning " of Section 13 (Civil Procedure Code) *under* the first Res- " pondent, and that the matter directly and substantially in " issue in this suit was directly in issue in suit No. 2 of 1875 " between the second Respondent and the first Respondent, " and that Plaintiff's claim in this suit is barred by Section " 13." (I. L. Rep., II. Mad., 328).

I have no doubt that this decision is sound law, although the contrary was held by the High Court (Innes and Muttusami Aiyar, J. J.) in S. A. 408 of 1880 reversing a decision of mine and remanding the appeal. That case is again before the High Court in S. A. 717 of 1881.

In a recent case (S. A. 25 of 1881) the High Court (Innes and Muttusami Aiyar, J. J.) reviewing the decision at I. L. R., II. Mad., 328, stated that it was an authority for the proposition that a decree against the Karnavan, the recognized manager of the property, in respect of which he

is sued, when the suit has been *bonâ fide* defended on behalf of the other members of the *Tarwad*, is binding on them, but that it was not an authority for the proposition that a decree against a Karnavan in a suit against him to recover a mere debt is binding on the *Tarwad* in the absence of fraud or collusion.

The Judgment in the same case contains a summary of the duties and powers of a Karnavan which it will not be out of place to quote here.

"Under Malabar law, the eldest male member of the " *Tarwad* is the Karnavan. In him is vested actually, " though in theory in the females, all the property, moveable " and immoveable, belonging to the *Tarwad*. It is his right " and duty to manage alone the property of the *Tarwad*, " to take care of it, to invest it in his own name (if it be " moveable) either on loans on *Kanom* or other security, or " by purchasing in his own name lands, and to receive the " rent of the lands. He can also grant the land on *Kanom* " by his own act or on *Otti* mortgage. He is not account- " able to any member of the *Tarwad* in respect of the " income of it, nor can a suit be maintained for an " account of the *Tarwad* property in the absence of fraud " on his part. He is entitled in his own name to " sue for the purpose of recovering or protecting property " of the *Tarwad*. None of the acts in relation to the above " matters can be legally questioned if he has acted *bonâ fide*. " If any of his acts have been done *malâ fide*, they can be " questioned by the members of the *Tarwad*, and he may be " removed for *malâ fides* in his acts or for incompetency to " manage and other causes. He is interested in the pro- " perty of the *Tarwad*, as a member of it, to the same " extent as each of the other members. All the members, " including the Karnavan, are entitled to maintenance out " of the *Tarwad* property. His management may not be " as prudent or beneficial as that of another manager would " be, but unless he acts *malâ fide* or with recklessness or

"with incompetency, he cannot be removed from such management. Almost the only restraint on him in such management is that he cannot alienate the lands of the *Tarwad* except with the assent of the senior Anandravan or, in certain circumstances, of others of the Anandravans." (I. L. Rep., II. Mad., 328).

(2). The Karnavan for the time being has an almost absolute control over the distribution of the family income and the family expenditure.

In A. S. 199 of 1855 (Tellicherry) Mr. Holloway says:—

"If a junior of the family is not properly supported by its head, his remedy is clear; but he is not justified in holding land of the family against the wish of its head. The authorization of his possession by a former Karnavan is asserted in appeal, but no proof whatever was adduced on this point, and seeing that it would be open to a succeeding Karnavan to alter his arrangement, if inclined, there would be no weight in it, if proved."

And in A. S. 108 of 1880, the High Court (Turner, C. J. and Muttusami Aiyar, J.) deal with the general position of a Karnavan thus:—

"The respect for elders, which is a marked feature of all Hinduism, is nowhere stronger than in Malabar, and consequently, although the individual interest of the manager of a *Tarwad* in *Tarwad* property is considerably less than that of a manager of a Hindu family, he has, in the management of the *Tarwad* property, somewhat larger powers than are accorded to a Hindu manager. While, equally with the manager of a joint Hindu family he is incompetent to aliene the estate without the consent of the other members of the *Tarwad*, except to supply the necessities of the *Tarwad*, or to discharge its obligations, he can not only make leases at rack rents ordinarily for the term of five years for cultivation, but leases with fines repayable on the expiry of the terms, in the nature

"of mortgages (*Kanoms*) and mortgages (*Otti*) in which "little more than a right to redeem may be left to the "family." (I. L. R., III. Mad., 169).

In S. A. 40 of 1864, the High Court (Frere and Holloway, J. J.) gave Judgment as follows:—

"The right of the eldest member of a Nambudri "family to manage the property as Karnavan is absolute, "and where, as here, a junior member has in fact managed "it, this is presumed to have been with the eldest member's "permission, and he may at any time interfere and take the "actual control." (II. Mad. H. C. Rep., 110).

And in S. A. 415 of 1877, the High Court (Innes and Kindersley, J. J.) say:—

"Mr. Handley contended that when a Karnavan had, "as in the present case, acquiesced in the continuance of "the arrangements formerly made for holding the pro-"perty of the *Tarwad* in separate divisions, he should be "held to be estopped from disturbing them in his life-time. "But upon the findings of the Lower Appellate Court, the "defendant's position is simply that of agent or manager "of a portion of the family property, and it is competent "to the family as represented by the Karnavan and senior "Anandravans, the plaintiffs in the suit, at any time to "revoke that agency and require that the property so in "defendant's control and management be replaced under "the Karnavan." (I. L. Rep., I. Mad., 351).

And again in S. A. 450 of 1881, the High Court (Innes and Muttusami Aiyar, J. J.) held that an allotment of certain lands for the maintenance of one branch of a *Tarwad* could not be regarded as a final arrangement. They say:—

"The numerical increase of the *Tarwad* must from "time to time necessitate a new distribution, and a Karna-"van is competent to call in property allotted in mainte-"nance and re-distribute it or make arrangements at his "discretion for the maintenance of the members."

In a recent case before me (A. S. 208 and 253 of 1881) a dispute arose as to the right of the Karnavan to re-distribute the rooms in the *Tarwad* house as he pleased. The senior lady of the family refused to give up the key of one room which she had occupied for many years. I held that the power of the Karnavan was absolute and that he was entitled to possession of the room.

(3). The Karnavan may delegate his powers of management, but not so as to be unable to resume them.

In S. A. 573 of 1869, the question arose whether an agreement entered into between a Karnavan and an Anandravan amounted to an irrevocable waiver and transfer of his rights, or was a power of Attorney. The Court came to the conclusion that it was the latter, and the *dicta* were not therefore necessary for the decision of the case. Holloway, J. was of opinion that in no case could a Karnavan renounce his rights and corresponding duties. Innes, J., adds, " Without the consent and authority of those interested in " the performance of the obligations." (VI. Mad. H. C. Rep. 151.)

The more limited proposition seems to be the sounder law.

In the case of the Ekkanath Kaimal it was sought to establish a custom in the family, by virtue of which the senior member of the family retired into dignified retirement and the senior members of the two branches managed the affairs of their respective branches. The Principal Sudr Amin found that plaintiff, who was one of these so-called branch Karnavans, had no authority to sue for the recovery of family property without the junction of the Valia Kaimal who was the *de jure* Karnavan of the *Tarwad*. The Civil Judge (Mr. Carr) on appeal held that there had been a division into branches or *Taverais* for 78 years, that the management of the two branches had been vested not in the Valia Kaimal but in the next senior members of each branch, and that plaintiff had a right to sue.

In S. A. 359 and 401 of 1870, the High Court (Scotland, C. J., and Holloway, J.) referred for trial the Issue:—

" Whether there was a binding and peculiar custom in " the family depriving the senior member of all manage- " ment of the property and vesting it in the branch Karna- " vans."

The Civil Judge (Mr. Sharpe) found that there was no such custom as alleged.

In deciding that the finding was not inconsistent with former decisions, Holloway, J., summed up thus:—

" I am of opinion: 1. That there is nothing compelling " us to decideo ontrary to the plain rules of law that this " delegation is irrevocable, perhaps it is not so even by the " delegator and still less is it so by his successors. 2. That " the fact of the setting apart of *Stanam* property, if it was " set apart, can make no difference, and as little can the " circumstance of the income reserved. 3. That there is " nothing to prevent us from deciding that the Civil Judge " is right in saying that this is an ordinary Malabar *Tarwad*, " and if I were at liberty to go into the fact, I should " entertain no doubt of it. 4. That the renunciation before " the Sudr Court is, I am disposed to think, not even " irrevocable as against him who made it, and certainly " would not have the effect of depriving the senior member " for all future time, of the rights which the law of the " country conferred upon him with the correlative duties " upon his becoming senior.

" With so peculiar a condition of property as that of " Malabar, it is most essential for the avoiding of complete " anarchy and consequent ruin to maintain the distinct rule " as to the Karnavan's powers. Wherever it is infringed, the " miserable consequences apparent in the present case " immediately result."

And Scotland, C. J., says:—

"Having considered these cases since the argument, "I concur in the conclusions that we are not constrained to "hold that the irrevocability of the arrangement effected "in 966 by the former head of the family as to the apportion- "ment of the family property between two *Taverais*, and "the management of each *Taverai's* allotment by its senior "member, is a matter conclusively adjudicated in the course "of the litigation of which there is proof in the records: "that such arrangement operated only as a personal renun- "ciation and delegation of the rights of management "possessed by the then head of the *Tarwad*, and that "assuming it to have been irrevocable by him (a point on "which I entertain at present doubts) it is not binding on "the 3rd defendant, who is admittedly the head of the "family by right of seniority." (VI. Mad. H. C. Rep., 401).

In A. S. 459 of 1881 (South Malabar) I held that where the delegation of authority amounted to a license coupled with an interest, it could not be arbitrarily determined by the Karnavan. That was a case in which the Karnavan authorised the Anandravan to collect the rents for one year, pay himself a debt due by his Karnavan, and apply the balance to the maintenance of the members.

In A. S. 59 of 1879, the High Court (Turner, C. J., and Muttusami Aiyar, J.) had before them a case in which the head of one of the Calicut *Kovilagams* claimed certain property in the hands of one of the junior members. The defendant set up his self-acquisition. The Court say:—

"Property acquired by any member of the *Kovilagam* "is in accordance with the principle recognized in the case "of the joint Hindu family, presumed to be the common "property of the *Kovilagam*, unless proof is given that it has "been acquired otherwise than with the aid of the common "funds: and as in other Malabar families, properties are "sometimes entrusted to the possession of a member who

" is not by the customary law entitled to their management, " either for the purposes of management or as an assign- " ment for maintenance. Such arrangements are made at " the pleasure of the Valiya Tambiratti of the *Kovilagam*, " who can also at her pleasure resume any properties which " have been so dealt with." (I. L. Rep. III. Mad., 141).

In A. S. 450 of 1881, the High Court (Innes and Muttusami Aiyar, J. J.) held that an allotment of property to a member of a *Tarwad* as maintenance under a family arrangement could not be regarded as a final arrangement, that the numerical increase of the *Tarwad* must from time to time necessitate a new distribution, and that a Karnavan is competent to call in property allotted in maintenance and re-distribute it or make arrangements in his discretion for the maintenance of the members.

(4). His powers of management may, however, be limited by contract.

In A. S. 336 of 1854 (Calicut) Mr. Holloway, as Sub-Judge, says:—

" I am clearly of opinion that the whole of the mem- " bers of a family have a right, by common consent, to regu- " late the Karnavan's agency, and that such regulations " will be binding on all such as have notice, express or " implied, of their existence." (Zillah Dec., September 1855, p. 18).

And again in A. S. 172 of 1859 (Tellicherry) Mr. Holloway, in dealing with a family *Karar*, says:—

" It is obvious that this document might narrow the " powers either of the Karnavan himself or of those who " took his place during his life-time, but that it could have " no force whatever after his death."

This decision was confirmed by the Sudr Court in A. S. 490 of 1860.

In A. S. 451 of 1861 (Tellicherry) Mr. Holloway held that a Rajah who had agreed to a division of management in respect of certain pagodas was bound by the agreement, and his decision was confirmed by the High Court in S. A. 368 of 1862.

And in A. S. 471 of 1861 (Tellicherry) Mr. Holloway says :—

" *Primâ facie*, the Karnavan is entitled to the posses-" sion of family property. He may of course, during his " life-time, narrow his own rights by contract, but here he " has not done so."

In S. A. 87 of 1857, the Sudr Court (Hooper, Morehead and Goodwyn, J. J.) upheld a decree of the Civil Court of Tinnevelly, whereby the joint control of the family property was vested in plaintiff and defendant by a *Karar*. (Sud. Dec. 1857, p. 158).

More recently, I have frequently had occasion to draw the distinction between a delegation of authority and a family settlement limiting the powers of a Karnavan, and have held that the Karnavan cannot revoke the latter. I will refer to one or two of these cases which have been confirmed by the High Court.—S. A. 718 of 1876 : 779 of 1876 : 590 of 1878 : 8 of 1880 : 357 of 1881.

In their Judgment in S. A. 8 of 1880, the High Court (Kernan and Kindersley, J. J.) say :—

" There is ample reason to suppose that the *Karar* was " executed for the benefit of the family. It was the outcome " of disputes and litigation in the family, and by it those " disputes and that litigation were happily ended. There " is apparently no reason for setting aside this *Karar*, and " certainly none at the instance of plaintiff (the Karnavan)."

And again in their Judgment in S. A. 357 of 1881, the High Court (Turner, C. J., and Muttusami Aiyar, J.) say :—

" The rights of the parties were adjusted by the com-" promise and the decree passed thereon, and in our judg-

" ment it has been properly held that the respondent was " to hold possession at least till some other arrangement " was made or possibly until the death of the Karnavan. " The right of the Karnavan to recover possession applies " to cases in which he has voluntarily conceded a temporary " possession to an Anandravan for management. Here he " has no greater right to put an end to the contract than " any member of the family."

(5). As an exception to the general rule, in some few Sudra families, a custom exists by which the management is vested in the senior female in preference to the senior male member of the family.

This custom is judicially recognized in the case of the Tambirattis of the Calicut *Kovilagams* (I. L. Rep. III. Mad. 141), but they are admittedly an exception to the rule that prevails among other Royal families (except the family of the Walluvanad Rajah) and among Nayars in general. Of course, if the custom can be supported by evidence, it is the duty of the Courts to uphold it.

In A. S. 299 of 1855 (Calicut) Mr. Holloway, as Sub-Judge, remanded a suit when the custom was set up on appeal. But in his final Judgment he says :—

" The proof upon which the Munsif has determined " the authority over this *paramba* to reside in the female " and not in the male members is wholly insufficient to " raise that inference. The documents from the oblitera- " tion of the name do not in fact show that Ittiyachi demised " the *paramba* to the present tenant, but supposing that " they did, it would indeed be a violent inference that there- " fore the authority resides in women only. The document " is dated 998 (1822-23), and it may well be that from the " incapacity of males from tender age the woman was " Karnavati in her life-time, but the weight of the evidence " clearly shows that the grantor of the *jemn* right, Rama " Paniker, succeeded her. This is clear from the payment " of revenue by him, which would carefully have been

"avoided if the truth were that in this family females had the "management of some portions of the property and males "of others. The separation in all acts of ownership would "have been most carefully enforced.

* * * *

"It is always presumed that a Karnavan is the "manager of all the family property, and they admit them-"selves to be subordinate members. There are exceptional "cases, but these require proof and no more than vague "statements opposed to the whole course of conduct have "been produced." (Zillah Dec., March 1857, p. 32).

And again in A. S. 194 of 1862 (Tellicherry) Mr. Holloway as Civil Judge says :—

"The only defence attempted there (in the Lower "Court) is that the 2nd defendant, the woman, has always "been the manager. To establish a custom contrary to the "general customs of the country, the clearest evidence is "required."

In A. S. 434 of 1878 (South Malabar) I had before me a case in which the custom of female management was found by the Munsif. I then wrote :—

"I cannot agree with the Munsif that the evidence is "sufficient to prove a family custom which, though it may be "in accord with primitive usage, is opposed to the present "usage of every other Nayar family in Malabar. I "do not deny that in some *Tarwads* females are entrust-"ed with the management with the consent of the males, "but I never yet heard of a case where the headship was "claimed as of right by a female, except in the case of the "*Kovilagams*.

* * * *

"The management of a female, like the management of "an *Anandravan* must, in my opinion, always be presumed "to be with the consent of those on whom the law confers "the right of management, *i. e.*, the senior male, and may

"at any time be resumed. In the present case, it appears "to me that all that 3rd defendant's evidence amounts to is "that her mother managed *Tarwad* affairs during her life-"time, and so much plaintiff admits. But is not the whole "evidence perfectly consistent with her having assumed the "management because there were no males of age in the "*Tarwad*? So far as can be seen, she managed excellently "for thirty-five years, and it may well be that the male "members as they grew up should wish to leave the "management in her hands."

My decree was confirmed by the High Court in S. A. 634 of 1878.

O. S. 118 of 1880 on the file of the Subordinate Court of South Malabar, was a suit brought by a Company to compel specific performance of a contract entered into by the three sole surviving adult males of a family to lease certain forests (then under attachment for several judgment-debts) for a period of 99 years. On behalf of a minor female in the family, her father had applied as next friend to be made a party to the suit, but the Sub-Judge had decided that she was sufficiently represented by her Karnavans. The High Court set aside this order and ordered her to be joined as a party and called up the suit for disposal. The case was heard by Mr. Justice Hutchins, and his Judgment when received in Malabar created considerable consternation.

I quote the following passages :—

"At the time of the contract, the 1st defendant was "the nominal Karnavan, while 2nd and 3rd defendants were "the adult Anandravans. The 4th defendant is the female "member entitled to the property. Upon her mother's "death in 1878 it devolved upon her, and after her it will "pass to her heirs and not to those of the adult defendants "or any of them."

* * * *

The parties were all anxious to compromise the suit and terms had been arranged, but the learned Judge felt bound to look after the interests of the minor who had been brought before the Court, and to require strict proof of the necessity or propriety of the bargain.

After observing that there were grounds for believing that money had been privately paid or promised to the adult defendants to induce them to execute the lease, he says :—

" It became more than ever necessary jealously to " scrutinize the terms by which it was proposed to bind the " minor's estate for a period of 99 years."

After going into the evidence, he held that there were debts aggregating 70,000 Rupees which were probably binding on the *Tarwad,* but that there was no family necessity which would justify the alienation of the estate for some three generations. He then proceeds to treat the defendants as trustees of the minor female and sums up thus :—

" On the whole, I am quite satisfied that this was a " contract made by a trustee or trustees in excess of their " powers, and I have strong reason to believe that they " agreed to it in conscious breach of their trust."

The objection that I take to this Judgment is that it assumes, without sufficient proof, that there was a valid custom in the family vesting the management in the females. Assuming that it had been so, I submit that if there was no adult female, the management would revert to the senior male who would have all the ordinary powers of a Karnavan. But the sole evidence of the custom consisted of some family *Karars* vesting the management in the senior female for the time being. There was actually evidence that the right of management under the *Karar* of 1855 had at one time been surrendered to the senior male, and that it was only after the agreement to lease had been entered into that

the management was nominally re-vested in 3rd defendant as guardian of his minor sister.

In concluding my remarks on this case, I think it right to observe that the experience of those best competent to judge tells them that, in nine cases out of ten, where a family arrangement has been made vesting the management in females, it has been done for the purpose of fraudulently delaying or defeating creditors.

Under the Canara law, which on high authority has been declared to differ only from the Malabar law in more consistently carrying out the doctrine that all rights to properties are derived from females, the custom of female management exists. The rights of the manager or *Yejaman* were thus defined by the High Court (Scotland, C. J., and Ellis, J.) in S. A. 238 of 1868.

" The legal right to the family property is vested in " the female members of the family jointly but for little other " practical purpose than regulating the course of succession. " No severance of the joint estate can be effected compulso- " rily, and the possession and control of the property belongs " exclusively to the *Yejaman* or manager of the family, who " is ordinarily the senior of the female members but subject " to the obligation of providing proper support for all the " other members, and they individually have no right to " anything beyond such support." (IV. Mad. H. C. Rep., 196.)

(6). The rights of the junior members of a Malabar family are the right of the males to succeed to the headship by seniority, and the right of the males and females to be supported in the family house.

In A. S. 275 of 1858 (Tellicherry) Mr. Holloway writes :—

" The junior members of the family are not entitled to " be supported out of the family house from the family

"property and, for aught that appears on the face of the "plaint, their removal from the family house and living "elsewhere is their own act, in which case they have no "claim whatever. To give them a cause of action, they "must have alleged and to succeed they must have proved, "that by the acts of their Karnavan they were deprived of "subsistence in their own family house. They have not "done so, but the whole tone of their plaint shows that the "estrangement is voluntary, and it is quite clear that unless "the result of their Karnavan's wrongful act, they have "no claim whatever. The division of a wholly unsettled "and disputed sum into aliquot parts and assigning one to "each, is wholly unsustainable on any principle of pleading, "law or Malabar custom."

Again, in A. S. 158 of 1860 (Tellicherry) which was a suit brought to recover subsistence from the head of the family at the rate paid by the deceased Karnavan, Mr. Holloway writes:—

"Save on the ground of special contract, the juniors "have no right whatever to sue in this form. They have a "right to be supported in the family house and nowhere "else."

And in A. S. 238 and 278 of 1860 (Tellicherry) the same Judge writes:—

"The equality of title asserted by every junior member "while he is junior and as regularly denied when he becomes "senior, is not a right of every member to an equal share of "the produce of the family property. Still less can this "right exist where the junior, as his witness states, lives "separately. The junior when subsistence is wrongfully "withheld has a right to its award by a Court of Law, which "will determine what proportion such amount should bear "to the whole property of the family."

In S. A. 202 of 1862, the High Court (Frere and Phillips, J. J.) had before them a case from Tellicherry decided by Mr.

Holloway. The following is an extract from Mr. Holloway's Judgment:—

" The plaintiffs recite that they are members of a family " following the rule of nephews, that the property of the " family is in the hands of the eldest member, and they ask " for a share of the income to be assessed by dividing the " whole income into equal parts. The plaint contains the " usual fallacy that all the members of the family have equal " rights therein. They have equal rights in one particular, " each has the right of succeeding to the management as " he becomes senior in age. The whole doctrine of a " Malabar family is that they are all to reside in the family " house and be there supported by the head of the family. " There never was the slightest pretence for saying that each " was entitled to an account, and if the head could not show " that he had expended an aliquot portion of the income " upon each member, that such member could sue for the " balance, yet to this length the plaint and the decree of " the lower Court would lead us. It is manifest that the " prayer of the plaint is as inadmissible as a plaint to divide " the whole property between the various members would be. " To give such a decree would be to violate the sound maxim " that the law will not allow to be done indirectly that which " it forbids being done directly. I have the very strongest " doubts whether it is open to any member of a Malabar " family to ask for support out of the family house, but it " being unnecessary here to decide it, I forbear stating the " numerous reasons for that opinion."

In dismissing the Special Appeal, Frere, J., says:—

" A family governed by the *Marumakkatayam* rule can " possess property only in its collective capacity. The " members individually are only entitled to maintenance in " the family house, and the doctrine of English Equity as to " the right of a *cestui-que-trust* to call for an account has " no application to a case like the present. The law is fully " explained by the learned Civil Judge in his decree, which

" is completely in accordance with the result of my eight " years' experience in Malabar." (II. Mad. H. C. Rep., 12.)

In S. A. 309 of 1868, the High Court (Scotland, C. J., and Collett, J.) had to determine a Canara suit brought to recover separate maintenance, past and future, from the head of a family governed by the *Aliya Santana* law. The facts found were that the plaintiff and defendants were members of one family, that for at least twenty years before the suit, the plaintiff had lived apart from the defendants and the other members of the family, and had during that time supported herself without receiving or applying for anything towards her maintenance from the family property in the defendants' possession, or obtaining any recognition of her right to maintenance.

On these facts, the Court found that the suit was barred by the Statute of Limitations, XIV of 1859. (IV. Mad. H. C. Rep., 137).

Under the present Limitation Act (XV of 1877) the Statute commences to run in a suit for arrears of maintenance, when the arrears are payable, and in a suit for declaration of a right to maintenance, when the right is denied.

In another suit from Canara, the High Court (Scotland, C. J., and Ellis, J.) held that a female member of a family governed by the *Aliya Santana* law living apart from her family with her husband, is not entitled to a separate allowance for maintenance out of the income of the family property. After defining the position of the *Yejaman* or manager, the Court say:—

" So far the law appears to be settled and imports " clearly, we think, the preservation of the unity of the " family, as the only effectual mode of securing to the mem- " bers severally a full share of the beneficial enjoyment of " the joint estate. The obvious effect of allowing one or " more members to quit the family and live apart on a por-

" tion of the income of the estate sufficient to support a " position like that enjoyed by the other members, would be " to reduce the benefits to the family in a greater or less " degree according to the numbers who might choose to live " separately on such allowances and nearly as much so as " by apportioning shares of the *corpus* of the property on " a division. It seems to us therefore that the peculiar " beneficial interest of the members individually in the " family property is in its nature incompatible with sepa- " ration from the family." (IV. Mad. H. C. Rep., 196).

In S. A. 593 of 1879 from South Malabar, the High Court (Kernan and Muttusami Aiyar, J. J.) say:—

" Though the general rule is that an Anandravan " cannot have separate maintenance, there may be rare " exceptions, and this case the Judge has found is one, as the " Karnavan has been the cause of quarrels which necessi- " tate the plaintiff leaving the family house. The mainte- " nance granted is intended to discourage such applications, " *viz.*, two Rupees *per mensem.*" (I. L. Rep. II. Mad. 282).

In S. A. 13 of 1880, which was a pauper suit from North Malabar, the High Court (Turner, C. J., and Muttusami Aiyar, J.) made the following observations as to the rate of maintenance.

" As to the rate at which maintenance has been " decreed, we observe that the appellants failed to produce " the *Tarwad* accounts, and in the absence of those accounts, " it is difficult to say that the maintenance awarded by the " Judge is out of proportion to the income of the *Tarwad.* " As to future maintenance, if in the future the income of " the *Tarwad* is greatly reduced, that may afford ground " for re-considering the rate of maintenance now awarded. " So long as the average income remains unaltered, there " is no reason why the plaintiffs should not be declared " entitled to recover maintenance at the rate now ascer- " tained."

In S. A. 653 of 1880, the High Court (Turner, C. J., and Kindersley, J.) held that "the general rule that a member "of the *Tarwad* is not entitled to maintenance, if she cease "to reside in the family house, is not contravened by the "recognition of a right to maintenance in a member residing "in one of several houses which convenience or necessity "has, as it were, affiliated to the original *Tarwad* house as "places of residence for members of the *Tarwad*." (I. L. Rep. IV. Mad. 169).

In S. A. 265 of 1881, the facts found were that the 1st plaintiff was a misbehaving member of the family, and that he was not in need of maintenance as he was possessed of exclusive property in his own right. On these grounds, his claim for arrears of maintenance was rejected by both the Lower Courts.

The High Court (Innes and Tarrant, J. J.) say:—

"It is contended in Second Appeal that plaintiff's mis-"behaviour does not disentitle him to his right to be main-"tained from the family funds. We think this contention "is well founded.

"A *Tarwad* does not differ in this respect from an ordi-"dary Hindu family, the manager of which is not entitled to "exclude the members from a right to a perception of some "portion of the income of the family property. It seems "apparent that if a Karnavan could adopt this course, it "might result in such an exclusive possession of the *Tarwad* "property on the part of the Karnavan and the rest of the "*Tarwad* as would in the course of years extinguish all "right in the Anandravan in the *Tarwad* property. The "circumstance that 1st plaintiff has other property is not "an element in the consideration of his right to share in the "enjoyment of the joint family funds. If it were, a man's "own individual industry and exertions might be the "means of depriving him of his right in the joint pro-"perty." (I. L. Rep. IV. Mad. 171).

And more recently in S. A. 547 of 1881, the High Court (Turner, C. J., and Muttusami Aiyar, J.) say:—

"The Judge is of opinion that, where the members of "one branch of the *Tarwad* house have private means of "their own, the Karnavan is not bound to make them the "same allowance as he does to other members of the "*Tarwad*," and then, after quoting the ruling in S. A. 265 of 1881, they proceed:—"These rulings, though apparently "contradictory, are not in our opinion irreconcileable. "*Primâ facie*, the members of a *Tarwad* have equal rights "to support out of family funds, but they are not entitled "to definite shares in the income, and the Karnavan is not "accountable if he gives to some more than to others, pro- "vided he gives to each what, under the circumstances, "would be a reasonable allowance for his subsistence. The "circumstances of each member in respect of his private "acquisitions would not affect his right to subsistence, "where the income was sufficient to provide a suitable sub- "sistence for all the members of the *Tarwad;* but where "the income is insufficient for this purpose, the Karnavan "must, with due regard to the interests of all, look to the "private means of each."

And lastly, in S. A. 23 of 1882, the High Court (Turner, C. J., and Kindersley, J.) say:—

"The members of the *Tarwad* are entitled to receive "maintenance out of the *Tarwad* house, when there is no "room for them in that house, and if the Karnavan makes "an insufficient allowance, the Anandravans are entitled "to apply to the Court to determine what allowance is "sufficient, having regard to the circumstances of the "family. When the wealth of the *Tarwad* increases, the "allowance may be increased."

The decision in S. A. 265 of 1881 apparently goes far beyond any of the previous decisions and has a most dangerous tendency to encourage family litigation. As explained by the decision in S. A. 547 of 1881, it is less open to objec-

tion. I venture, however, to submit that, according to the generally received opinion, contumacious conduct on the part of an Anandravan does disentitle him to a separate maintenance. As stated in the old cases, his right is a right to be maintained in the family house and nowhere else. Again, if members of a family are living apart from the *Tarwad* on their own acquisitions, their claim to a separate maintenance is strictly untenable, unless the separate residence is an arrangement sanctioned by the *Tarwad*.

As to the rate of maintenance usually awarded, a practice, for which I am mainly responsible, has grown up in South Malabar of limiting the rate to a proportionate share of half the available income.

It has been held, and I think justly, that the Karnavan is entitled to retain half the income for his own maintenance and the extraordinary expenses of the *Tarwad*, such as renewal of leases, repairs of buildings and performance of family ceremonies, and that the other half is available for the support of the other members. If it is more than enough to afford them a suitable maintenance, the rate is proportionately reduced. I may mention that the practice is based on the system adopted by the Government in distributing the *Malikana* allowances to the chieftains of the District. One half of the allowance was set apart for the head of the family and the other half distributed among the other members.

CHAPTER III.

Removal of Karnavan.

If the Karnavan has entered upon a course of conduct which, unless checked, must end in the ruin of the family and if he persistently disregards the interests of the family of which he is the head, and more especially if he violates his own solemn promises of reformation, sufficient ground has been shown for his removal and the substitution of some fitter manager in his place.

In appointing a new Karnavan, the wishes of the members of the family ought to be consulted.

The earliest authority on record as to the interference of the Courts is a Judgment of the Provincial Court of the Western Division passed on 13th June 1813. That was a suit for partition. The Court (Stevens and Clephane, J. J.) say:—

" The demand on the part of plaintiffs for a division of the " property belonging to the *Tarwad* or family, of which they " are members, is totally at variance with the established " practice of the country. In cases where the *Marumakkata-* " *yam* rule of inheritance prevails, the property is considered " as indivisible. The management thereof and the collection " of the rents and income being invariably vested in the " senior male, on whom devolves the duty of providing for " the support and maintenance, as far as the funds will " admit, of the other branches of the family, especially of " the women and children.

" The Courts of justice can only interfere in the event " of its being proved that the Karnavan or senior has shown " himself unworthy of such management from incapacity or " gross extravagance and inattention to just claims and " wants of the junior members, when he may be set aside " and another of the seniors appointed in his stead."

Then after commenting on the fact that as plaintiffs (two males) were junior to defendants, they could have no right to participate in the management, the Court nevertheless " consider it to be just and expedient as well as to be " not inconsistent with the customs of the country that the " plaintiffs Amboo and Kelloo shall be invested in the " character of Anandravans with a joint share in the future " management of the remaining property, to the end that " they in conjunction with the Karnavan Cannen may " proceed to take an account of the debts due and mortgages " on the property, in order to clear off the same, either by " assigning the property mortgaged in lieu of the debt, " where the said debt may equal or exceed the value of the " property mortgaged or by the sale of the said property " when the value thereof shall be more than the amount of " the mortgage."

From the decree of the Provincial Court, there was an appeal to the Sudr Udalut, A. S. 28 of 1814. The Court (Scott and Greenway, J. J.) confirmed the decree of the Provincial Court. (I. Sud. Dec. 118).

In A. S. 172 and 173 of 1858, Mr. Holloway as Civil Judge of Tellicherry gave Judgment as follows :—

" It only remains to determine whether he (the Karna- " van) has been guilty of such misconduct in his trust, as " justifies his removal from the management, for it is quite " clear that such removal will be ordered where the conduct, " which he has pursued, shows that the family affairs cannot " safely be left in his hands. A, the *Jemn* deed of this " bazaar, most clearly shows that in asserting it to be his own

" property, he has lied grossly and evidently for the purpose " of passing it to his own blood relations. His pretence " first, that the bazaar is his own, then that his son will " inherit it, and then that he has expended large sums of " money upon it, all clearly show that he is guilty of the " attempts with which the plaintiffs have charged him. " This is further clear from his own assertion that he has " pawned property, and that he asserts his right to do what " he likes with it. It is obvious that he is a man of very " advanced age, for he was actively litigating before the " year 1823, and is no doubt entirely under the control " of his blood relations as his answers in this case plainly " show. The result of his continuance in the management is " abundantly clear. There is not the slightest proof that " any of this property is self-acquired, and it appears to me " clear that a Karnavan who sets up a defence of this kind, " in clear fraud of the family, has by that act alone exhibit-" ed his unfitness to continue in the management. The " denial of his lessor's title is the greatest offence which a " lessee can commit, and it is difficult to see how a Karnavan " can more clearly show himself an unfit person for the office " than by claiming as his own property which is that of " the family to which he belongs. The rule of descent " exists and the effort of the Courts should be in accord-" ance with the law to prevent the gross acts of spoliation " constantly carried on by heads of families, which have " reduced some of the most respectable families in Malabar " to beggary. Such prevention can only be effected by " removing from their posts men who are proved to have " acted as this man has done. Feeling clear that all the " property here sued for is the property of the family " and that defendant has been shown by his own acts " to be an unfit man for the management of that pro-" perty, my decree in accordance with what I conceive " clear law will be to remove him from the post of Karna-" van and declare that the management shall be vested in " the next senior member."

This decree was confirmed by the Sudr Court in S. A. 373 of 1860.

Again in A. S. 61 of 1860, Mr. Holloway as Civil Judge of Tellicherry made a similar decree. His Judgment concludes:—

"It has been pressed upon me that it is very inconvenient to remove Heads of families. I allow that it should never be done without clear proof that the conduct of the head is calculated to beggar the family. But considering that this has been made out, I confirm the decree of the Lower Court and dismiss this appeal with costs."

In R. A. 24 of 1876, the High Court (Holloway and Kindersley, J. J.) had before them a case in which it was sought to remove the Valiya Tambiratti of the Pudia Kovilagam.

The Subordinate Judge refused to grant the relief sought and the High Court confirmed his decree. There is an unauthorized report of the Judgments (Madras Law Reporter, p. 130) from which the following extract is taken.

Holloway, J. "I do not agree with the Subordinate Judge that one act of misfeasance on the part of a Karnavan is enough for the Court to take action in the matter. To warrant such a proceeding, there must be evidence of a course of conduct on the part of the Karnavan of a kind tending to defeat the very purpose for which the *Tarwad* is in existence."

In O. S. 5 of 1870, Mr. Reid as District Judge of Tellicherry had before him a case in which 12 members of the Cherikal Kovilagam sued for a declaration, that encumbrances to the extent of more than Rs. 1,00,000 raised by the manager, who was also third Rajah, were invalid, and for his removal from the office of manager. Mr. Reid found that in his position of manager, the Rajah's position

was the same as that of an ordinary Karnavan, that the alienations made were unjustifiable and ordered his removal. His decree is dated 29th March 1876.

Against his decree no less than twenty-two appeals were preferred to the High Court. The High Court (Morgan, C. J., and Kindersley, J.) on 23rd March 1877, reversed Mr. Reid's decree and dismissed the Original Suit, but without prejudice to any question that may be hereafter duly raised respecting the alienations. Unfortunately, they omitted to record any Judgment in the case.

The next case was that of the Collangode Nambidi, one of the ancient aristocracy of South Malabar. The family consisted of only two adult males. The younger brought a suit to remove the elder. It was found by the lower Courts that the conduct of the elder was such as to justify his removal but that the interests of the *Tarwad* would not be safer in the hands of the younger than in the hands of the elder. On appeal, I decided to appoint a Receiver of the estate. Meanwhile, a second suit was brought by the senior female in the *Tarwad* to remove the elder male and appoint her in his place. The lower Court dismissed the suit in consequence of my decision.

The High Court (Morgan, C. J., and Holloway, J.) had both suits before them and recorded the following Judgment :—

" The litigation by which it has been sought to remove " the Karnavan from his position has terminated in a finding " that no one of the persons who seek to depose him is " better qualified than he for the office, and the Judge has " handed over the management of the *Tarwad* to a person " called a Receiver.

" These proceedings show very clearly the mischievous " extension of the doctrine as to the removal of Karnavans.

" It is a kind of litigation which is of recent growth, " has been fostered by the sympathies of Judges who are

" themselves Anandravans, and, as in a case which recently " came before us, it has been exercised on the mistaken " principle that a man can properly be removed whenever " a single departure from his duty to act equally for the " benefit of all can be proved against the Karnavan.

" In such a state of property and family relations as " that of Malabar, there must be a constant conflict of inte- " rest with duty. This, however, throws upon the Courts in " case of such conflict the duty of checking acts referable " to interest of that character, but it by no means justifies " the treatment of the Karnavan as a mere trustee, officer " of a corporation, or other person to whom he has been " likened. The law in this case, as in so many others, has " suffered from the pressing of a false analogy. The person " to whom the Karnavan bears the closest resemblance is " the father of a Hindu family. Like him, his situation as " head of the family comes to him by birth. He should " certainly not be removed from his situation except on " the most cogent grounds. The office is not one conferred " by trust or contract, but is the offspring of his natural " condition. Expediency speaks the same language as the " law. Benefit seldom accrues to a family or an institution " from removing one man and putting in another. It is " generally the substitution of the empty leech for the full " one. The belief that this removal will take place on " slight grounds has led in this very family to a long course " of litigation which must have caused much of the expendi- " ture complained of. It is stirring up family quarrels " throughout the District, and no more striking instance " than the present of the inexpediency of such a course could " be given. The plaintiff in the regular suit is really the " Brahmin paramour of one of the women, a by no means " desirable manager of a Malabar family. The plaintiff in " the other suit is a greater spendthrift than the Karna- " van. The grounds given for the Karnavan's removal " would certainly not have satisfied us of the propriety of " taking that course. The question is not merely whether

"a man is unworthy of his position, for that is not the "ground for removing him, but whether the removal will "benefit the family.

"We certainly can see no case which could justify any "Court in saying that his conduct has been such as to "satisfy it that he cannot be retained in his position with-"out serious risk to the interests of the family; still less "can we see ground for the revolutionary remedy of the "District Judge.

"Compelled to choose between introducing a stranger "and leaving the management in the hands of him to whom "law and custom assign it, there can be no doubt on the "facts of this case that we ought to choose the latter course. "The state of families and property in Malabar will always "create difficulties. Their solution will not be assisted by "bringing in the anarchy and insecurity which will always "follow upon any attempt to weaken the natural authority "of the Karnavan.

"In all these cases, the order of this Court will be to "dismiss the original suits. There will be no costs through-"out." (I. L. Rep. I. Mad. 153).

This was thenceforward regarded as the leading case on the subject both in North and South Malabar.

In 1877, there were two cases one in North and one in South Malabar.

In A. S. 397 of 1876 (North Malabar) Mr. Reid decreed the removal of a Karnavan on the ground of intemperate habits, frequent absence from his *Tarwad,* contracting debts subsequently to the disposal of a suit in which a *locus penitentiæ* had been granted to him and last but not least the extraordinary procedure of putting the collection of the rents in the hands of Embrandries, many of whom as a caste are grasping money lenders.

This decree was confirmed by the High Court (Kernan and Kindersley, J. J.) in S. A. 712 of 1877.

In A. S. 162 and 319 of 1877 (South Malabar) I decreed the removal of the Head of the Edatara *Tarwad* which is a branch of one of the ancient houses forming the Nayar aristocracy of Malabar. I summed up in the following words :—

" The conclusion I have arrived at is that there will be " no peace in the *Tarwad* and no chance of the preservation " of the *Tarwad* property until 1st defendant is removed. " The *Tarwad* houses are now in ruins and it is evident " to me that 1st defendant has used the position which " the law and custom conferred on him to enrich himself " and neglect his obligations. In the present suit, it will " be observed that the Anandravans are almost unanimous " in asking for his removal whereas in O. S. 120 of 1872, " the majority sided with him. Since that suit was decided, " he has broken his promises and all future hopes of his " amending his ways are vain. He has neglected to support " the members of his family who by law and custom look " to him for support. He has encumbered the family pro- " perty fraudulently and, looking at the income of the " *Tarwad*, unnecessarily."

My decree provided for a separate annual allowance on a liberal scale to the late Karnavan. This decree was confirmed by the High Court (Morgan, C. J., and Innes, J.) in S. A. 586 of 1877.

In A. S. 137 of 1879 (North Malabar) Mr. Reid, in modification of the Munsif's decree removing a Karnavan, directed that his power should in future be restricted by compelling him to join his senior Anandravan in all acts of management. On appeal (S. A. 766 of 1880) the High Court (Turner, C. J., and Muttusami Aiyar, J.) recorded a Judgment from which the following is an extract.

" We are not aware of any instance in which a Court " retaining a Karnavan in office has imposed on him such " conditions as those to which the Lower Appellate Court " has, by its decree, subjected the Appellant.

"The Court must either pronounce a Karnavan unfit "for his office and dismiss him from it or if it retain him, "it must allow him to exercise the ordinary functions of a "Karnavan unless he consents to surrender them."

A precedent might have been found for the course adopted by Mr. Reid in the case decided by the Provincial Court of the Western Division (see above).

In two cases which recently came before me, A. S. 59 and 75 of 1872 and A. S. 69, 78, 80 and 112 of 1882, I, in ignorance of the High Court decision in S. A. 766 of 1880, held that although the Court would not grant the full relief prayed, *i. e.*, the removal of the Karnavan, it would grant a modified form of relief in the shape of an injunction to the Karnavan to restrain him from granting fresh encumbrances without the express assent of the adult members of his family.

With all deference to the High Court, I submit that such a remedy is not inconsistent with Malabar usage.

In A. S. 372 and 382 of 1881 (South Malabar) I again ordered the removal of a Karnavan who had broken his solemn agreement not to encumber family property without the consent of his Anandravans, who had persistently refused to provide maintenance for his Anandravans and compelled them for four consecutive years to have recourse to suits, who had allowed the family lands to be attached and, on one occasion, sold for arrears of Government Revenue, and who omitted to defend a suit where a good defence was open to him and which would have been decided against him but for the intervention of another member of the family.

This decree was confirmed by the High Court (Kernan and Kindersley, J. J.) in S. A. 753 of 1881.

In A. S. 4 of 1880, the High Court (Turner, C. J., and Muttusami Aiyar, J.) had before them a case from North Malabar in which the Karnavan had granted to the 2nd defendant a lease for 99 years of a tract of forest computed to

contain 120 square miles for coffee or other cultivation at an annual rent of 200 Rupees. The only consideration received for granting the lease was a Promissory note for 500 Rs. The junior members objected to the lease and asked for the removal of the Karnavan. There had been previous litigation in the family which resulted in a compromise which however proved ineffective. The Sub-Judge set aside the lease but refused to remove the Karnavan, quoting as his authority the case of the Collangode Nambidi. On appeal, the High Court say: —

" We have fully considered the observations made by " the learned Judges by whom that case (I. L. R. I. Mad. " 153) was decided, and we agree that the Court should " remove from office a Karnavan only when a strong case is " made out to show his unfitness for the office. But the " circumstance to which we have adverted appears to us to " establish such a case. For the reasons recorded in the " connected appeal, we have arrived at the same conclusion " as the Subordinate Judge as to the invalidity of the " lease to Mr. *Tod;* and although, if this lease had stood " alone, we might have considered its extreme improvidence " did not justify us in depriving the Respondent of his " position, yet, when taken with the conduct he has for " some years pursued, it affords the strongest evidence that " he is unfit for his position, and that the management of " the *Tarwad* estate can no longer be left in his hands with " due regard to the interests of the family. The granting " of the lease is not an isolated act; it is a wilful misuse of " his powers, following on a course of conduct in which he " persistently displayed disregard for the interests of the " *Tarwad* and violated the contract which had been imposed " on him to restrain his irregularities." (I. L. R. III. Mad. 169.)

CHAPTER IV.

Alienations by Karnavans.

ALIENATIONS by a Karnavan, whether in the form of gifts, sales or mortgages, are invalid unless made with the assent, express or implied, of the junior members.

In the case of gifts or sales, the express assent of the family is required. The junction of the senior Anandravan is some but rebuttable evidence that the family assented. It is not absolutely necessary that the senior Anandravan should affix his signature to a deed of sale or gift. If the deed was drawn up in the *Tarwad* house and the adult members of the family were present and verbally assented, the transaction is valid.

In the çase of mortgages and simple bonds, it is sufficient to prove an implied assent on the part of the family. Such assent will be implied if the transaction is shown to have been for the benefit or necessities of the family. Until recently, such assent would have been implied from the mere signature of the Karnavan, though it would have been open to the junior members to impeach the transaction.

A *bonâ fide* creditor is protected if, after due enquiry, he satisfied himself that the money was required by the Karnavan for a family purpose. Even

if the power of the Karnavan to borrow was limited by a family agreement, it would still be necessary to show that a *bonâ fide* creditor had notice of such agreement.

It is impossible to lay down any inflexible rule as to the burden of proof in suits between creditors and junior members of the debtor's family. It lies on those who impeach a particular transaction to give some evidence that it was beyond the scope of the Karnavan's authority. It lies on those who uphold it to show that there was some kind of enquiry made at the time of the transaction. Circumstantial evidence will be of far greater weight than oral evidence. The ways and means of the family, the previous conduct of the Karnavan, the presence or absence of family dissensions, the means of knowledge of the lender, the relation between the lender and borrower, the publicity of the transaction, the truth or falsity of the recitals in the documents are all matters for consideration.

There will always be a strong presumption that alienations by a Karnavan in favor of his immediate relations and still more in favor of his own children are fraudulent.

The whole of the *Tarwad* property is liable for a *Tarwad* debt properly incurred by its head.

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(1). In the case of gifts or sales, the express assent of the family is required.

In the Vyavahara Samudram, a law treatise in Malayalam verse, the principles of which are professedly derived from the text book of Narada, though the details are

founded on the practice of the country, is the following stanza stating the incidents necessary to give validity to a deed of sale (*Atti-pet*).

" When one takes from another the *jenmam* (proprie-
" tary right) by the water of obligation, the prescribed
" law is that, according to an excellent rule, there should be
" six persons present; namely, people of pure caste, rela-
" tions, a son, the scribe of the king, and people connected
" with the parties.

" Unless these here mentioned are present, no portion
" of land must be bought." (See Papers on Mirasi right, p. 202).

Major Walker in his Report upon the tenures and forms of transfer of land in Malabar, 1801, writes:—

" At the time of executing this deed (*Atti-pet*), which
" completes the purchase, six persons must be present, *viz.*:

" One of the caste of the *Jenmkar*; one of his near
" relations or kindred; the heir; a person on the part of
" the Rajah or Sovereign who must be apprized of the
" transaction; the person who draws out the *Karanam*
" or deed; and the Deshawali, the chief of the village or
" district."

It is partly in accordance with the ancient custom, as here recorded, and partly on the ground that all the members of the family are joint tenants, that the Courts have held that a sale is not valid without the consent of the heirs or Anandravans. As a matter of fact, outright sales were of very rare occurrence in ancient times. It is hardly necessary to observe that the stanza in the Vyavahara Samudram refers to a deed of sale by a Brahmin where the son is the heir.

The earliest judicial authority on the subject of alienation of real property is a Judgment of the Provincial Court of the Western Division in A. S. 70 of 1816, where it was held that a deed of sale signed by the head of the family

alone but executed in the presence of the whole family and without a dissentient voice, was valid.

This was followed by a decision of the same Court in S. A. 27 of 1839. It was there held that "no Karnavan "can alienate real property, whether acquired by himself "or otherwise, without first obtaining the consent of his "Anandravan (or next heir)."

This was quoted as the leading case by Mr. Frere in A. S. 18 of 1854 and A. S. 38 of 1854 on the file of the Tellicherry Civil Court. (Zillah Dec. August 1854, p. 17; June 1855, p. 13).

In A. S. 5 of 1845, the Sudr Court had before them a suit to set aside two mortgage bonds for 1,500 Rupees executed by the Karnavan in fraud of the family. In their Judgment occurs the following passage:—

"It is an established rule that the lands of a *Tarwad* "though they may be mortgaged, cannot be alienated by "the Karnavan without the consent and signature of the "Anandravan, and this rule alone would render null and "void upon principle the mortgage under consideration, for, "with reference to the amount, it is not obvious how its "recognition should have any other effect than that of "depriving the respondents of their patrimony."

In A. S. 282 of 1855 (Calicut) Mr. Holloway, the Sub-Judge, ennunciated the law thus:—

"The principle upon which restriction is placed upon "the right of a *jenmi* to dispose is that, in fact, the law "regards all the descendants of the common ancestor in "the female line as joint tenants of the property whose "assent must be procured to the alienation, or at all "events, it must be shown that the alienation was for a "proper purpose and for the common benefit."

And again,

"The right of gift and the right of sale are on "precisely the same footing." (Zillah Dec. July 1857, p. 6.)

In remanding A. S. 108 of 1857 (Tellicherry) the Sudr Court observed "that a Karnavan may not alienate family "property without the written consent of his chief Anan-"dravan and that where he has parted with his title to pro-"perty by his own act under the circumstances that none "of his Anandravars were of age to join him, it should be "satisfactorily shown that the deed was for the benefit or "necessity of the family." (Proceedings of 28th April 1860).

In A. S. 137 of 1858 (Tellicherry) Mr. Holloway held that an outright sale of property cannot be made without the assent of the senior Anandravan.

And in A. S. 169 of 1862 (Tellicherry) the same Judge held that union of the senior of the junior members in the sale is, in the absence of evidence to the contrary, satisfactory evidence that the sale was made for family purposes and with an enlightened view to the family interests.

In A. S. 380 of 1862, the High Court (Scotland, C. J., and Strange, J.) in deciding that a Karnavan singly had authority to create an *Otti* mortgage, held that in the case of a sale, it was requisite that the senior Anandravan should, if *sui juris*, concur in the conveyance. (I. Mad. H. C. Rep. 122).

In A. S. 25 of 1862, the High Court (Frere and Holloway, J. J.) expressed themselves as follows:—

"All that is necessary is that the sale should be made "with the assent, express or implied, of all the members of "the *Tarwad* and that the Karnavan and the senior Anan-"dravan, if *sui juris*, should join in the deed of sale. Such "assent will be implied where, as in the present case, the "sale is found to have been for the benefit of the family. "Here the District Munsif and the Civil Judge have also "found that the Karnavan and the senior Anandravan "executed the deed. Such execution is *primâ facie* evidence "of the assent of the whole family. The onus of proving

" their dissent rests on those who deny their assent." (I. Mad. H. C. Rep. 248).

And again in S. A. 387 of 1862, the High Court (Phillips and Holloway, J. J.) say :—

" The sale by a Karnavan of *Tarwad* land requires, no " doubt, the assent of the Anandravans. But the signa- " ture of the chief Anandravan, if *sui juris*, is sufficient " evidence of the assent of himself and the rest to the sale, " and throws the burden of proving dissent therefrom on " him who alleges such dissent. The Anandravans' assent, " however, may be proved by means other than the signa- " ture of the senior and in the present case, where the " Court has found that the Plaintiff an Anandravan was " present and assented to the sale, he clearly has no ground " for this appeal." (I. Mad. H. C. Rep. 359).

Lastly in S. A. 230 of 1866, the High Court (Holloway and Innes, J. J.) gave Judgment as follows :—

" The fact that the property was *Tarwad* property is " undisputed. It is the unquestionable law of Malabar that " such property is inalienable, that the eldest member holds " it for the support of the members of the family. It is " equally clear that on the establishment of an adequate " family necessity, alienations will be upheld, but it lies upon " the purchaser to make out, with abundant clearness, that " the purpose was a proper one. The alienation in the pre- " sent case was, on its face, an improper one inasmuch as it " is not pretended that there existed the slightest considera- " tion for Chandu Nayar's agreement except the desire to " provide for the maintenance of the members of the family.

" The proper mode of providing such maintenance was " from the income and a case is scarcely conceivable in " which a mere voluntary alienation of the *corpus* subject to " the claims of all the members, to some of those members " could be upheld. Equal dealing is the duty, all are " equally entitled to support and such an alienation is mani-

" festly a fraud upon the rule of law. This would be suffi-" cient for the disposal of the present case. It was a volun-" tary alienation to two members of the family of that which " the Karnavan was bound to conserve in his own hands and " transmit so far as possible unimpaired to his successor for " the maintenance of all the members of the family.

" In this particular case, therefore, it is not strictly " necessary to deal with the opinion expressed by the Mun-" sif as to the signature by the next senior member. As " however the effect of such signature does not seem to have " been very clearly apprehended, it will be well to make a " few observations upon it. *Primâ facie*, it lies upon the pur-" chaser of family property to show that the alienation was " made for proper purposes. The assent of the senior Anan-" dravan is some evidence that the purpose was proper " and may have more or less effect upon the conclusion " according to the circumstances of the case; such signature " would however have by no means prevented the dissentient " members from showing that both the Karnavan and his " apparent successor have really violated their duty. It " would however render it unquestionably difficult to give " relief against *bonâ fide* purchasers not affected with notice. " At the same time, the state of Hindu families is so well " known, the consulting of all the members so easy, that it " would perhaps not be difficult to conclude that there is " an obligation upon a purchaser to inquire and that he would " be affected with notice by much slighter evidence than a " purchaser in other countries. The reason of requiring the " assent of the member next in age is the supposition that " he, at all events, is interested in guarding in its entirety " the property of which he is to succeed to the management. " When, however, as in the present case, he, as well as the " Karnavan belongs to the branch improperly benefited, the " reason of the rule no doubt fails, and little or no weight " ought to be attached to his junction. It is peculiarly " important in a country like Malabar in which a Karna-" van's duty is in habitual conflict with his private affections

" and interests, that the Courts bound to maintain the law
" should not deviate from established principles.

" It is not however the law that assent can be proved by
" the signature only; although undoubtedly Courts having
" experience of the extreme love of documentary evidence
" among the people of Malabar, would probably be slow to
" give credit to oral evidence that a man who had not
" signed had been present at the execution and assented.
" It is however no absolute rule of law that there must be
" written assent, as this Court laid down in a reported case."
(III Mad. H. C. Rep. 294).

It is hardly necessary to produce any authority for the proposition that sales by a person against whom a decree has been or is about to be passed and sales by husband to wife or father to children will always be regarded with the utmost suspicion. Such transactions are by no means uncommon in Malabar and are generally held to be fraudulent transfers whether they are in the form of gifts, sales or mortgages.

Perpetual leases of property and leases for a long term of years occupy a position midway between gifts and sales on the one hand and mortgages and simple debts on the other.

In A. S. 108 of 1880, the High Court (Turner, C. J., and Muttusami Aiyar, J.) had before them the question whether a Karnavan had authority to make a lease for 99 years. After dealing with the general powers of a Karnavan (the observations have been quoted in Chapter II) the Court say:—

" We have not been able to ascertain that he (the Karna-
" van) has ordinarily power to make any other dispositions
" of property than such as are sanctioned by local usage, and
" although this Court ought, so far as it is justified in so
" doing, to construe liberally the powers which managers
" are competent to exercise so as to enable them to deal with

" *Tarwad* property as it would be dealt with by a prudent " owner for the benefit of the family, and to interpose no " unnecessary obstacles to the employment of property in " new industries, in so doing it undertakes what in some " cases may be no easy duty—the determination of what acts " are and what are not beneficial, and it cannot lose sight of " the fact that the office of Karnavan is fiduciary, and that " a Court has no authority to confer on Karnavans larger " powers than such as are sanctioned by usage."

And lower down—

" No evidence has been adduced in this case which " would warrant us in finding that by local usage the " Karnavan has such power, and the Subordinate Judge " states that he is not prepared to hold it to be within the " ordinary powers of the Karnavan. Nevertheless had the " decision of the present appeal turned on this point, we " should have been disposed, in view of the importance of " the question, to direct further enquiry.

" Leases for long terms may be detrimental, if not to " the present owners of an estate, at least to their successors. " Leases whereby at the end of the term the properties are " returned to the owners deprived of much that constituted " their value, as by the denudation of forests or exhaustion " of mines may be highly detrimental. On the other hand, " leases for long terms may not only be beneficial to the " present owners of property, but equally or even more so " to their successors, and unless a long term is granted, it " may be impossible to secure these benefits. Building " leases are probably unknown in Malabar, but they afford " an illustration. Ordinarily a lessee will not take such a " lease except for a long term of years, but conditions are " introduced which not only secure to the owners rent as " high or higher than would be paid for the use of the land " for agricultural purposes, but to the successors of the " owners the reversion of the property with its value greatly " enhanced.

" But although building leases may be unusual, if not " unknown, in Malabar, there might probably be found " there, as are found in other parts of India, leases granted " for long terms of years to secure the reclamation of land " and the conversion of an estate, which at present brings " but small returns, into an estate yielding a gradually " increasing rental and reverting to the owners with its " value greatly enhanced. The lease which the appellant " has obtained from the Karnavan is a lease for cultivation, " and it is argued in support of it that it is beneficial to the " family. There is no proof of any family necessity to justify " it, and the sole ground on which it can be supported (if " it is within the powers of the Karnavan to grant so long " a term), is that it is such a lease as would be made by a " prudent owner. If, on the face of it, and on reference to " the circumstances, it appeared to be so, we should, as we " have said, have directed further enquiry as to local usage. " But the lease on the face of it is not such as any prudent " owner would enter into." (I. L. R. III. Mad. 169).

With reference to these observations, it is submitted that a permanent lease and *à fortiori* a lease for a long term, are within the powers of a Karnavan if shown to be clearly beneficial to the *Tarwad* but not otherwise.

Building leases, where the land with the buildings on it revert to the lessor are, I believe, unknown in Malabar. The only building leases recognized are where a site is leased out and the tenant erects his house. In such cases it is held that there is an implied contract to compensate the tenant for the buildings erected by him, if reasonable. (See Chapter IX).

Even where a house worth 3,000 Rupees had been erected on a waste paramba given by the head of a *Tarwad* to his wife, the High Court (Kindersley and Muttusami Aiyar, J. J.) in S. A. 361 of 1880, refused to allow the tenant to be disturbed without receiving compensation; though the plaintiff sought to set aside the alienation of the

site as prejudicial to the interests of the *Tarwad*. In adopting this course, the High Court, I apprehend, acted rather on the general principles of equity which had been adopted in a Tanjore case (VI. Mad. H. C. Rep. 245) than on any special custom of Malabar.

Reclaiming leases are very common in Malabar and they have been dealt with in Chapter IX. Occasionally they are in the form of perpetual leases, but I do not remember any instance in which the right of the *Tarwad* to the reversion was reserved without payment of compensation. They are, however, in one sense beneficial to the *Tarwad* inasmuch as lands which formerly yielded no rent now yield at least a small rent, and in some instances a fine or premium has to be paid at the end of every twelve years.

(2). In the case of mortgages and simple bonds, it is sufficient to prove an implied assent on the part of the family.

In accordance with a recent decision of the High Court (Kernan and Muttusami Aiyar, J. J.) there is no distinction in point of principle and law between an express charge and a simple debt. Both require the same foundation in order to bind the family and the estate. (I. L. Rep. III. Mad. 149).

At the same time, I apprehend that less proof will be required as to the enquiry made by the lender in the case of a simple debt than in the case of a mortgage, the former being of a more temporary nature and therefore more likely to be within the scope of the manager's authority.

I have treated gifts and sales as standing on a different footing from mortgages and simple debts, though in a recent case (S. A. 25 of 1881) the High Court (Innes and Muttusami Aiyar, J. J.) draw the distinction between alienations (including mortgages) and debts. They say :— " The authority of a Karnavan to make alienations of " immoveable family property stands upon a different " footing from his power to pledge the credit of the family.

" The former power is not unlimited. The assent of the " other members of the family must be shown to the parti- " cular alienation. The assent of the senior Anandravan " is regarded as sufficient evidence of the assent of the " family. The Karnavan is not therefore the agent of " the family to make alienations, but must have special " authority in each case. As the manager of the family " property, he has authority to pledge the credit of the " family for necessary purposes, but it would be too much " to hold that the family property is liable to be dissipated " by enforcement of decrees against the Karnavan for any " simple debt of whatever character contracted by him. " The result would be that, though tied down by the " rule which requires him to have the assent of the mem- " bers of the *Tarwad* to an alienation of immoveable " property, the Karnavan might enter upon a career of " extravagance and ruin the *Tarwad* by suffering involun- " tary alienations of the *Tarwad* property in execution of " decrees against him."

The leading case in the Sudr Court on the subject of the liability of the family for debts incurred by the Karnavan is A. S. 69 of 1844 (not reported). A suit (11 of 1838) had been brought in the Provincial Court, Western Division, by a Mr. Fell to recover from the family of one Pangi Achen a sum of 33,000 Rs. alleged to be due under certain timber contracts entered into with him as Karnavan of his *Tarwad.* The defendants contended that they were not responsible for the debts of Pangi Achen which were not for the benefit of the family and that Pangi Achen had no authority to alienate indefinitely the right of cutting timber in the forests.

In the Provincial Court, a decree was passed against the share of the family property which, on division, Pangi Achen would have been entitled to. It had been previously held by the Sudr Court in A. S. 28 of 1814 (I. Sud. Dec. 118) that the property of a Malabar *Tarwad* was impartible but no reference was made to that decision.

On Appeal (69 of 1844) the Sudr Court remanded the suit with the following observations :—

" The grounds on which the Provincial Court refused " to make the whole of the members of the *Tarwad* respon- " sible for the contracts entered into by the deceased Pangi " Achen, while Karnavan of the family, are that the plaintiff " had failed to prove that the debts contracted by the said " Pangi Achen had been incurred for the joint benefit of the " family or that previously to the contracts being entered " into, the whole of the members of the family had been " consulted and had signified their concurrence in their " terms.

" It is customary in Malabar, that the affairs of the " family should be managed by the chief member of it; " and unless some positive unfairness or fraud should be " discovered in a transaction of a pecuniary nature into " which the Karnavan may enter, the whole of the members " of the family are bound by his acts.

" The Court of Sudr Udalut believe that it is on " no occasion customary to call together the whole of the " members of the *Tarwad* and obtain their sanction to any " agreement into which the Karnavan is about to enter. " There is that confidence throughout the Province that the " subordinate members of the family will both sanction and " support whatever their chief may do, that agreements are " without hesitation entered into with him, although they " involve every member of the family in their terms.

" The plaintiff asserted this to be the principle on which " the contracts were entered into generally in Malabar, and " on it he contended for the liability of the defendants " to fulfil the agreements made by Pangi Achen. The " defendants denied the principle and maintained that the " approval of all the members was necessary. Here then " the parties were at issue on a most important point in " which the local custom of the Province was in question,

" and on which the Court was bound to require them to
" offer evidence.

" With reference to the first ground stated by the " Provincial Court for their decree (that the plaintiff had " not proved that the contracts entered into were beneficial " to the *Tarwad* in general), the Sudr Udalut are of " opinion that this was a point which the plaintiff could " not have been required to prove. It was sufficient that " he should show by evidence that the contract on which " his claim was founded had been entered into by the head " of the family in a fair and open way forbidding the " thought of secrecy, and that he had fulfilled his part of " the contract by making the advances for which he had " stipulated. If in opposition to this the defendants could " show that the *Kararnamahs* were of such a nature that " they could not have been entered into for the benefit of " the family, it became their province to adduce evidence " to establish it.

" The plaintiff declared that the contract had been " entered into in the presence of the Munsif of the District " and other influential and respectable persons.

" The publicity thus given to the transactions would " seem to forbid the notion that anything like unfairness " was to be discovered in them. The Provincial Court was " bound to examine all the persons who were then present, " and to ascertain whether they considered the contracts to " be fair to both parties entering into them.

" If the transactions obtained such publicity, it must be " supposed that the whole of the members of the *Tarwad* " were fully aware of them and that they at least tacitly " acquiesced in them."

The suit was re-heard by the Special Commissioner Mr. Waters, who laid down the following propositions of Law.

(1). Family property is not liable for debts contracted

by a Karnavan or manager when such debts are not contracted for the benefit of the family.

(2). To maintain that a Karnavan cannot, without the presence and approbation of his Anandravans, who may be at variance among themselves, borrow a sum of money for necessary or profitable expenditure, is to depose him from his office and to neutralize his powers.

And then, proceeding to apply that law, heheld that the money advanced to Pangi Achen was in the nature of a mercantile transaction, which was calculated to be beneficial to the *Tarwad*, and that it was no defence to the suit to prove that the income of the *Tarwad* was large and that there was no necessity to borrow or to enter into the contracts. He accordingly decreed for plaintiff against the defendants out of the estate belonging to the *Tarwad*.

The Sudr Court approved the law as laid down by Mr. Waters and concluded their Judgment in the following words :—

"The Court are firmly of opinion that both in equity "and in law, the several members of the *Tarwad* are liable "for the debt. It was impossible that the contract should "have existed without their knowledge and the contract "was obviously for their benefit. It was clearly proved that "it was entered into openly, its circumstances were known, "and there is not the least reason to suppose collusion."

The final decision in A. S. 69 of 1844 was passed on 15th December 1845.

The principle of that decision was again affirmed by the Sudr Court in A. S. 5 of 1845 from a decision of Mr. Strange in O. S. 28 of 1842 (Tellicherry). That was a suit to set aside two mortgage bonds for 15,000 Rs. as fraudulent. The Court said :—

"It is open to a Karnavan of a *Tarwad* to raise money "upon mortgage without procuring the signature of the "Anandravan to the bond. Were it not so, his manage-

"ment would in very many cases be merely nominal. It is "however absolutely necessary when such transaction takes "place, that it should be for the good of the *Tarwad* or "family, and that it should be divested of deceit and fraud."

But in A. S. 259 of 1842 (Tellicherry) which was a suit for money due under a mortgage deed executed by the Karnavan, Mr. Strange thus lays down the law:—

"It now remains to be determined whether the consent "of the defendants as coheirs with Moosa was necessary to "give validity to the transaction upon which the plaint is "founded. The Court is of opinion that their consent thereto "was requisite."

And again:—

"The reason, in pursuance of which the consent of "Anandravars is ever required, is that all are held to have "a common interest in the family possessions, and, therefore, "although the active management thereof is to be under "the government of the senior member, the Anandravars "are to have a voice in transactions affecting the property "in order to prevent him from forwarding his own interests "at the expense of theirs."

This decision was confirmed by the Sudr Court in A. S. 29 of 1846 on 31st December 1847, apparently without reference to the former decisions.

In A. S. 37 of 1844, the Sudr Court held that *Tarwad* property was not liable for a debt contracted by the head of a *Tarwad* for his own use (II. Sud. Dec. 76), and the same principle was again affirmed in S. A. 95 of 1866 (Sud. Dec. 1856, p. 205).

In S. A. 38 of 1852, the Sudr Court gave Judgment as follows:—

"Property belonging to a *Tarwad* is answerable for "debts contracted by the Karnavan or managing member, "unless it can be clearly and satisfactorily proved that they

"were not contracted for the benefit of the *Tarwad.* The "formal consent or signature of the other members of the "family is not necessary to render a bond or other document "executed by the said Karnavan valid and binding on them "if a *bonâ fide* transaction done with their knowledge or "consent or for their behoof."

On 23rd August 1853, the Government communicated to the Sudr Court an extract from the report of the Special Commissioner in Malabar (Mr. Strange), dated 25th September 1852, containing suggestions on the subject of tenant right and the tenure of family property in Malabar. The Special Commissioner considered that a practice had grown up inconsistent with the current usage of the country of making family property liable for the debts contracted by individual members of it other than the Karnavan or managing member. The Sudr Court, after consulting the Civil Judges of Tellicherry and Calicut, passed Proceedings on 13th February 1854. The following is an extract from those Proceedings:—

"In regard to the liabilities of families governed by "*Marumakkatayam* usage, the Court deem it proper to "observe that it is clearly an error to presume that each "member of a family is possessor of an individual share in "the estate available for the discharge of his debts: the "rule being that in all such families the family property is "only liable for obligations incurred by the head of the "family and for its uses."

The law is thus summed up by Mr. Strange in his Manual of Hindu Law, 1856.

"A Karnavan may raise money on mortgage for the "use of the family without the assent of the Anandravans. "It is only in making absolute alienation that their con-"currence is necessary.

"The signature of the Anandravans is not necessary to "give validity to bonds executed by the Karnavan.

"Debts to be chargeable on the family property must "have been contracted for the uses of the family by the "Karnavan or other member managing under his sanction. "The debts of individual members cannot be charged on "the property.

"The family property is not liable for a debt contract- "ed by the head of the family for his own use.

"The debtor's estimated share in the family property "is not liable for individual debts.

"A debt contracted by a Karnavan would be presumed "to have been for the uses of the family and chargeable on "the estate until the contrary might be shown, and one by "an Anandravan would be presumed to have been an "individual obligation not so chargeable unless otherwise "proved."

In 1856 Mr. Holloway, as Sub-Judge of Calicut, thus dealt with a case in which it was sought to set aside an attachment in execution of a decree against a Karnavan.

"The borrower was the Karnavan of plaintiff's *Tarwad*, "as is admitted by all, and his loans must be taken to "be for *Tarwad* purposes until the contrary is proved. "Nothing is heard of his misbehaviour until he is in his "grave, and if affirmative proof of the propriety of the "purpose were, as it is not, required, the long silence "of the members of the family would afford it. It is quite "true and does not require the quotation of cases to "establish it, that a private loan to a Karnavan will not "be satisfied from the family property, but the position of "the Kárnavan dealing with all the property and protect- "ing the subordinate members requires the burden of prov- "ing that his debt is a private one to be laid on those who "assert it. This is a presumption no less necessary to the "well being of the family itself than to the protection of "honestly dealing third parties. Who would supply the "pressing, perhaps temporary, wants of a family if liable

"to be defrauded of his rights by the sudden death of the "borrower, unless he could do by evidence, what would "indeed be impossible, follow the money lent to the pur- "poses to which it was applied, and show that the object "was one which specifically benefited the joint community? "This is not necessary and not being necessary, the appeal "fails." (Zillah Dec. October 1856, p. 23).

And in another case in 1857 (A. S. 362, 370 and 371 of 1855) Mr. Holloway, as Sub-Judge of Calicut, laid down the law thus :—

"Now the rule of law is plain that a Karnavan can "burden the family property without the consent of any "member and if the members deny that the purpose is a "proper one, the burden of proving the impropriety lies "on them : in the absence of such proof, the purpose must be "presumed proper and the encumbrance binding." (Zillah Dec. March 1857, p. 20).

Again and again the Sudr Court and Mr. Holloway as Civil Judge of Tellicherry reiterated the principle that, in the absence of evidence to the contrary, a debt contracted by a Karnavan is presumed to be a family debt. Singularly enough, in the eight Volumes of the Madras High Court Reports, no express decision is to be found. But the law on the subject was too well known to be disputed, and the whole current of decisions since the Sudr decision of 1852, *i. e.*, for a period of thirty years, has uniformly proceeded on the same lines.

In a recent case, however, (S. A. 332 of 1880) the High Court (Innes and Kindersley, J. J.) rule that there is no such presumption of law. They say :—

"Upon the evidence already recorded, the Judge "concluded that the loan was made under circumstances "which would render it binding on the *Tarwad*. But in "coming to this conclusion, the learned Judge held that "*every debt contracted by the Karnavan is presumed to be*

" *for the uses of the family and chargeable on the family* " *estate until the contrary is shown*, and the objection has " been taken that the Judge has thrown the burden of " proof on the wrong party.

" We are not prepared to adopt the learned Judge's " opinion as to the presumption in the very broad terms in " which it has been laid down. Whatever may be the " powers of a Karnavan in the management of the property " of the *Tarwad*, it is clear that the Karnavan cannot, with- " out the consent of the members of his *Tarwad*, bind them " to pay his private debt. In many cases, the surrounding " circumstances, in the absence of direct evidence, may " tend to show the purposes for which the debt was con- " tracted. But, in the absence of all evidence, we are not " aware of any presumption of law that a debt contracted " by a Karnavan was contracted on behalf of his *Tarwad*. " In such a case, it is for the creditor to show if it is " disputed that the obligor had authority from the family " as their agent or manager to contract debts and that he " assumed to act in the particular instance as such agent or " manager. When this is shown, it lies on the family to " show that in the particular instance, the obligor was not " acting within the scope of his authority." (I. L. Rep. " III. Mad. 288).

In a still more recent case (S. A. 25 of 1881) the High Court (Innes and Muttusami Aiyar, J. J.) treat the question as one of agency and state that the ordinary rules of evidence must be followed. They at the same time admit that it depends on the circumstances on whom, in any particular case, the burden of proof lies as to the necessity for the loan and that no invariable presumption ought to be applied to the settlement of such questions.

And again in S. A. 221 of 1881, the High Court (Turner, C. J., and Innes, J.) say:—

" In view of recent rulings which have recognized that " the burden of proof is on the creditor to give some evidence

"that the debt is of such a character that persons not parties "to the contract may be charged with it, this second appeal "cannot be maintained."

The result of these decisions is practically to introduce the Privy Council rule in Hanuman Persad's case (VI. Moore's I. A. 419) which is a more stringent rule than has hitherto prevailed in Malabar except in cases of sales.

With all deference to the High Court, I submit that in S. A. 332 of 1880 I merely stated the presumption in the language in which it was stated in Strange's Manual of Hindu Law and as it has been frequently stated by eminent Judges conversant with the customs of Malabar. I submit that there *is* a presumption of Law that every act that is within the ordinary scope of an agent or manager of an undivided family is done *bonâ fide*. The only difference between me and the High Court is whether that presumption is strong enough to shift the burden of proof.

Whilst I maintain that in transactions with third parties (excepting gifts and sales) the Karnavan is something more than the responsible agent of the family and that his individuality is merged in his corporate character, the High Court rule that in each particular case, it is for the creditor to show that the Karnavan had authority to act and did act as agent or manager.

In support of my view, I have a long current of decisions extending back to at least thirty years and the great authority of Mr. Mayne who in his work on Hindu Law, p. 264, says:—

"In Malabar and Canara where the property is indissoluble, the members of the family may be said rather to "have rights out of the property than rights to the "property. The head of the family is entitled to its entire "management and is absolute in its management."

The change introduced by the recent decision of the High Court is not perhaps of any great importance. Where publicity has been given to the transaction or where there

is a recital in the deed or bond that the money was borrowed for a *Tarwad* purpose, it will, I apprehend, be open to the Courts to find that the burden of proof lies on those who wish to impeach the transaction.

It can hardly be seriously contended that a purchaser at an execution sale is in a worse position than a creditor who obtains a judgment debt against the Karnavan or his legal representative and seeks to enforce it against the family.

In both cases, the issue to be tried is whether the debt is binding on the family.

I should not think it necessary to say anything on this matter but for the *dicta* in a recent Judgment of the High Court in S. A. 25 of 1881. In that case, the junior members of the family brought a suit to set aside a sale of family property in execution of a money decree obtained against the Karnavan. Both the lower Courts found that the sale was valid and dismissed the suit. The High Court (Innes and Muttusami Aiyar, J. J.) say:—

" According to what we have always regarded as a " most erroneous practice, the Courts below, in executing " the decree, went into the question of what the decree " meant beyond what it plainly said.

" The decree made the 1st defendant liable. The 1st " defendant happens to be also the Karnavan of the plain- " tiff's *Tarwad.* The Courts therefore construed the decree " as a decree against the *Tarwad* when, on the face of it, it " was not so and sold up the properties of persons who " were no parties to the decree. In the suit brought by " these persons, they do not put their claim to recover " expressly upon the ground that the decree does not make " them in terms answerable and they have gone to trial " upon the following questions which do not properly arise " in such a suit, *viz.*:—

" Whether the sale for which the debt was made was " binding on the *Tarwad* property?

"Whether there was due notice given to the public "and to the defendants of the *Karar* alleged by the plain- "tiffs in the plaint as binding on 1st defendant ?

"Whether 1st defendant has been acting upon the "contract that has been executed ?

"The two last issues referred to allegations on the part "of the plaintiffs that the Karnavan's authority had been "expressly limited by the other members of the *Tarwad*."

After proceeding to state that all that was purchased was simply the right, title and interest of the judgment debtor, that the judgment debtor was 1st defendant alone, that his interest was all that was or could be sold under the decree, that the purchaser was not in any way led to suppose that he purchased more than the interest of the judgment debtor and is not therefore a sufferer if his right of purchase is strictly confined to the right of the judgment debtor in the property, the Judgment proceeds :—

"It is true that in a case of this kind (*Deendyal Lal* v. "*Jugdip Narain Singh*) what was the character of a debt "is not the real question, which is simply what passed "under the sale in execution of the money decree, but the "plaintiffs have gone to trial on the footing that they will "consider the decree and all the proceedings in execution "binding on them, provided that it is shown that the debt "was incurred for family necessities, and we think it would "not be doing justice between the parties if we insisted on "a stricter rule in their favor.

"We shall remit to the District Court the issue as to "the character of the debt and also require a more precise "finding upon the other questions. The issues we remit "for trial are :—

"(1). Was the debt for which the decree was obtained "against 1st defendant incurred for the benefit of the "family or for proper family necessity or purpose, or did the "lender make enquiry and satisfy himself that the money "was borrowed for proper *Tarwad* purposes ?

" (2). When the debt was incurred, had the Karnavan " authority to borrow the money for the *Tarwad* without " the consent of the members of the *Tarwad* ?

" (3). If the authority of the Karnavan was limited, " had the lender (2nd defendant) notice of the limitation of " authority."

It will be observed that the *dicta* of the High Court in S. A. 25 of 1881 were not acted on, and I venture to submit that they are wholly inapplicable to Malabar.

In the first place, I doubt whether the Privy Council ever intended to lay down any rule of general applicability in Deendyal Lal's case (L. R. IV. 247). In a subsequent case, they admit that cases may arise in which a decree against an individual is a decree against the family. (L. R. VI. 233).

In the second place the *ratio decidendi* in Deendyal Lal's case is that each member of an undivided family has a definite right to a share of the family property, which can be ascertained by partition. This is not the case in Malabar and *cessante ratione cessat lex.*

Lastly the right, title and interest of an individual member of a Malabar family is simply the right to be maintained in the family house and to succeed to the headship by seniority, and it is difficult to see how this can be made the subject of sale.

In returning my finding on the Issues referred for trial in S. A. 25 of 1881, I took the opportunity of expressing my dissent from the *dicta* and in their final Judgment, the High Court explain that all they intended to imply was that (peculiar customs notwithstanding) the rules of procedure binding on the Courts elsewhere are equally binding in Malabar. They then proceed to apply the rule by suggesting that a *Tarwad* might perhaps be sued as a corporation, but if it does not strictly fall within the denomination of a corporation, Sec. 30 of the Civil Procedure Code would at all events apply and render it necessary to give notice of

the institution of the suit to all adult members of the family, and that proceedings in execution could only be taken against such persons as were expressly named in Sec. 235 of the Code.

The whole matter is thus left in a most unsatisfactory position. If indeed the members of a *Tarwad* were simply co-parceners and the Karnavan *primus inter pares,* I should be compelled to admit that the hitherto prevailing procedure of the Courts in treating a decree against the Karnavan as *primâ facie* a decree against the family was erroneous. But it seems to me that the matter requires much further investigation than it has yet received. If the view taken by Mr. Mayne in his valuable work on Hindu Law, § 264, is correct, and I maintain that it is, then in law the Karnavan is something more than an agent and manager. He is in fact the legal owner of the family property subject to restrictions as to its use which restrictions the law will enforce when called on to do so.

On this subject I may refer to a finding, submitted by Mr. Rozario, the Sub-Judge of Tellicherry on the following issue referred by the High Court (Turner, C. J., and Muttusami Aiyar, J.) in S. A. 488 of 1881.

Issue :—

" Whether sale in execution was made of the property " of the *Tarwad* or merely of the rights and interests of the " judgment-debtor."

Finding.—(Extract from).

" From the admitted facts that the debtors and plain- " tiffs are members of a *Tarwad* governed by the *Maru-* " *makkatayam* rule, that the principal debtor Pakuren was " the Karnavan of the *Tarwad,* that the senior Anandravan, " 1st defendant, joined his Karnavan in executing the bond " and that the suit against 1st defendant was brought and " a decree obtained when he was the Karnavan of the " *Tarwad,* and from propositions and presumptions, which " cannot be disputed, *viz.,* that hypothecation of *Tarwad*

"property is within the scope of a Karnavan's authority, "that the debt contracted by the Karnavan and his senior "Anandravan was contracted for a proper *Tarwad* purpose "and that the decree obtained against the Karnavan is "binding until set aside, upon the members of the *Tarwad* "although not parties to the suit, the conclusion seems to "me inevitable that what was sold under a binding "decree against the *Tarwad* was the interest of the *Tarwad* "hypothecated by the representative of the *Tarwad.*"

(3). A bona fide creditor is protected, if after due enquiry, he satisfied himself that the money was required by the Karnavan, for a family purpose.

As to the nature of the enquiry, reference must be made to the leading case in the Privy Council which is commonly known as Hanuman Persad's case and is reported at VI. Moore, 393.

The question is not as elsewhere complicated by the right of the co-parceners to enforce partition and it would probably be held that the Karnavan far more nearly resembles the head of a Patriarchal family than the managing member of an ordinary Hindu undivided family.

The same kind of enquiry will not be expected from an uneducated agriculturist who advances his money to his neighbour as from the professional money lender.

The two last issues raised by the High Court in S. A. 25 of 1881 (quoted above) are precisely the issues which ought to be raised when the power of the Karnavan is limited by contract and the creditor professes ignorance of the limitation. In a case decided by Mr. Holloway as Sub-Judge of Calicut, in 1855, he thus lays down the Law:—

"It is here attempted by the plaintiff to avoid a trans-"action into which the legal representative of their family "has entered and which, if nothing else existed in the case, "would be binding upon them. Here however it is con-"tended that in so contracting, their representative has

" violated a fundamental rule of co-parcenary on which all " the members are agreed. I am clearly of opinion that " such plea would not avail them as against a stranger. If " they allowed their Karnavan to deal with the property, " it would be concluded that he had full authority to do all " things usually done by men in his position, and it would " not be open to them afterwards to come in and say that " they had enacted private rules limiting his authority as " the rules in this case do. Here however there is something " more in the case. The defendant makes the important " admission that he knew of the existence of certain rules " but he merely disputes the accuracy of their represen- " tation by the plaintiffs. I am however clearly of opinion " that the defendant has no ground for this objection and " agree with the Munsif that the rules produced are the " ones enacted. We have here then the case of a man, " who, having notice of the existence of rules, chooses " to contract in defiance of them. Nothing would have " been easier than for him to prove that he did not " know of such rule by the production of the deed for " 14,000 fanams *kanam* admitted by the plaintiffs, and " if it appeared that this was executed by the Karnavan " in the ordinary manner, it would be a ready mode of " disposing of the plaintiff's case. As the matter stands, " however, I am clearly of opinion that the whole of " the members of a family have a right by common consent " to regulate the Karnavan's agency and that such regu- " lations will be binding on all such as have notice, either " express or implied, of their existence." (Zillah Dec. Calicut Sub Court, 1855, p. 19).

In returning a finding on an Issue referred to me in S. A. 635 of 1880, I acted on the principle laid down by Mr. Holloway and the High Court (Innes and Muttusami Aiyar, J. J.) affirmed my decree.

It would of course be held that very slight evidence of notice was sufficient, and that notice included such know-

ledge as a party ought to have had if he had not wilfully abstained from making or grossly neglected to make due enquiry.

(4). The whole of the Tarwad property is liable for a Tarwad debt properly incurred by its head.

There have not been wanting attempts by the Courts to disregard the rule of impartibility and to hold the share of the individual liable for his individual debts.

In 1850 Mr. Forsyth as Civil Judge of Tellicherry, held that it was the practice to sell the share of a junior member of a Nambudri *Illam* in satisfaction of his debts, and his order was confirmed by the Sudr Court in their Proceedings of 9th December 1851.

In their Proceedings of 13th February 1854, however, the Sudr Court reviewing Mr. Strange's report on Malabar outrages, upheld the ancient practice and lay down the rule in clear language.

" In regard to the liability of families governed by " *Marumakkatayam* usage, the Court deem it proper to " observe that it is clearly an error to presume that each " member of a family is possessor of an individual share in " the estate available for the discharge of his debts; the " rule being that in all such families the family property is " only liable for obligations incurred by the head of the " family and for its uses."

In S. A. 68 of 1857, the Sudr Court remanded A. S. 231 of 1855 (Tellicherry) on the ground that if the property was simply purchased *benami* in the name of the senior female, it was liable for *Tarwad* debts, whereas if it was the private property of the said female, it was not so liable. (Sud. Dec. 1857, p. 147).

And in S. A. 504 of 1863, the High Court (Frere and Holloway, J. J.) held that property assigned by the males of a Nayar family for the support of their females is still family property and liable as such to be taken in execution of a

judgment against the Karnavan which was binding on the family. (II. Mad. H. C. Rep. 41).

The general rule of course is that junior members cannot claim adverse possession against the family. But there may be exceptions to that rule. In S. A. 829 of 1880 the High Court (Turner, C. J., and Hutchins, J.) held that by openly asserting a hostile title to property in his possession, a junior member might after twelve years acquire a prescriptive title as against the *Tarwad*. That was a case in which a junior member claimed by inheritance property acquired by the deceased head of his branch, and had retained possession since the acquirer's death and for more than twelve years. It was admitted that on the acquirer's death, the property should have descended to the Karnavan of the *Tarwad* and not to the acquirer's nearest Anandravans. (I. L. R., III. Mad. 212). See also the case reported at I. L. R. III. Mad. 141.

The presumption against the liability of family property for a debt contracted by an Anandravan is very stringent. The only exception to the rule is where the Anandravan has been placed in the position of manager of a whole or part of the *Tarwad* property and has been held out to the world as the *de facto* Karnavan. He will then be in the same position as one who combines the *de facto* with the *de jure* title.

This principle was recognized by the Sudr Court in 1847 (Proceedings of 26th June 1847) by Mr. Chatfield as Civil Judge of Tellicherry in A. S. 111 of 1856 (Zillah Dec. July 1857, p. 4) and in 1859 by Mr. Frere as Civil Judge of Tellicherry in A. S. 226 of 1857.

In conclusion, I cannot do better than quote a passage from Mr. Mayne's Hindu Law, Section 273.

" The liability of one person to pay debts contracted " by another arises from three completely different sources " which must be carefully distinguished. These are first,

" the religious duty of discharging the debtor from the " sin of his debts:—secondly, the moral duty of paying a " debt contracted by one whose assets have passed into the " possession of another:—thirdly, the legal duty of paying " a debt contracted by one person as the agent, express " or implied, of another. Cases may often occur in which " more than one of these grounds of liability are found " co-existing, but any one is sufficient."

In all the cases reviewed, the legal duty is the sole ground of liability. The moral duty can only come into play if the *Tarwad* has inherited the self-acquired property of one of its members.

CHAPTER V.

Separate and self-acquired Property.

The self-acquisitions of an individual member of a Malabar family are at his absolute disposal during his life time, and the last survivor of a joint family has the same power over the family property as if it were his self-acquisition. At the death of the acquirer, all acquisitions which he has not disposed of form part of the family property. Whether they pass by right of inheritance or right of survivorship is a question which has never been distinctly raised and decided. If the former, according to the authorities, the acquirer might dispose of them by will: if the latter, he could not.

(1). The self-acquisitions of an individual member of a Malabar family are at his absolute disposal during his life time.

The earliest decision on the subject of self-acquisitions is S. A. 27 of 1839 in the Provincial Court of the Western Division. The Court held that no Karnavan can alienate real property, whether acquired by himself or otherwise, without first obtaining the consent of his Anandravan.

And again in S. A. 88 of 1859 the Sudr Court (Hooper, Strange and Phillips, J. J.) held "that it is immaterial "in what way land is obtained in Malabar in a family "governed by *Marumakkatayam*, the rule being that, how"ever acquired by a member of the family, it becomes "incorporated in the family possessions and is under all "the restrictions as to alienation affecting such property." (Sud. Dec. 1859, p. 226).

In this case, the dispute was between the son and the family of the acquirer.

The same principle was followed by the Sudr Court (Strange and Frere, J. J.) in S. A. 85 of 1860. (Sud. Dec. 1860, p. 133).

The first recognition of the right of an individual member to dispose of his self-acquisitions occurs in a Judgment of the High Court in S. A. 378 of 1863. The High Court (Phillips and Holloway, J. J.) held that "self-acquisitions "of land by a member of a *Tarwad* are his separate pro-"perty during his life and may be charged by him for his "personal debts. After his death, they lapse into the *Tar-"wad* property but, if accepted by the members, they carry "their obligations with them."

The law was subsequently more fully laid down by the High Court (Scotland, C. J., and Holloway, J.) in S. A. 223, 224 and 259 of 1864. The Court say:—

"It is unquestionably the law of Malabar, that all "acquisitions of any member of a family undisposed of at "his death form part of the family property, that they do "not go to the nephews of the acquirer but fall, as all other "property does, to the management of the eldest surviving "male.

"It is however as unquestionable law that the acquirer "is fully entitled to hold, incumber and dispose during his "life-time of his self-acquisitions. That doctrine, of the "soundness of which we entertain no doubt whatever, was "laid down by this Court in a case unfortunately not "reported, and is unquestionably in accordance with usage; "for in all the reckless litigation of Malabar, one member "of the Court, with the judicial experience of several years, "does not remember an instance of a Karnavan attempting "to get into his own hands the self-acquired property of a "junior member. That a Karnavan, who is in possession of "the family funds, will be supposed to have made all acquisi-

"tions with them, and for the benefit of the corporate body, "is unquestionable. It is also clear that it lies upon those "who assert such self-acquisitions, to make them out by the "most satisfactory evidence, so strong is the presumption "in the case of a Karnavan against self-acquisition. When "once established, however, we are perfectly satisfied that "an alienation, charge or other disposition to take effect at "once made during his life-time, will be perfectly valid." (II. Mad. H. C. Rep., 162).

(2). The last survivor of a joint family has the same power over the family property as if it were his self-acquisition.

In S. A. 285 of 1855 (Calicut) Mr. Holloway as Sub-Judge deals with the question whether a Dayadi had a right to question a sale made by the last surviving member of a *Tarwad.* He says:—

"If the deceased was the sole remaining direct heir of "the common ancestor in the preferable line, the whole joint "tenancy merged in her person, and she would be as to the "right of alienation, in precisely the same position as the "absolute acquirer of the property seeing that she is the "final legal representative of such acquirer." (Zillah Dec. July 1857, p. 6).

And in A. S. 723 of 1877 (South Malabar) I held that the last surviving member of a Brahmin family might alienate his whole estate to his sister's son and that the alienation would operate as a *donatio mortis causâ* and could not be disputed by Dayadies. My decision was affirmed by the High Court in S. A. 297 of 1878.

(3). At the death of the acquirer, all acquisitions which he has not disposed of form part of the family property.

The rule thus laid down in the case already quoted which is the leading case on the subject (II. Mad. H. C. Rep., 162) is undoubtedly in accordance with the ancient usage which regarded the family as an indissoluble unit and took no thought of the individuals composing that unit. A practice

however appears to have sprung up of allowing self-acquired property to pass to the nearer heir in preference to the head of the family. Thus a woman's children inherited her self-acquisitions and a man's self-acquisitions were inherited by his nearest Anandravan for the benefit of his branch.

In A. S. 320 of 1852 (Calicut) Mr. Cook as Sub-Judge says:—

"According to the laws of nepotism, a nephew may be "heir to a Karnavan's private property but as regards "the *Tarwad* property the eldest member of the *Tarwad* is "the rightful heir." (Zillah Dec. March 1853, p. 4).

Mr. Strange in his Manual adopts the rule laid down by Mr. Cook as regards moveable property.

Mr. Holloway did not however assent to this doctrine. In A. S. 366 of 1861 (Tellicherry) he held that property whether self-acquired or otherwise in the hands of an individual passes at the moment of his death to his family.

And again in A. S. 19 of 1862 (Tellicherry) he held that the self-acquisitions of a Karnavan passed at his death to his family and was not inherited by his nearest Anandravans. This decision was confirmed by the High Court in S. A. 98 of 1862.

Traces of the practice alluded to by Messrs. Cook and Strange are still however cropping up in the Courts. In the case which came before the High Court in S. A. 106 of 1877, the Munsif found that there was a special custom in the family by which the self-acquisitions of a member of one branch of a *Tarwad* became the property of the branch at the death of the acquirer and not the property of the *Tarwad*. The District Judge, Mr. Reid, reversed the Munsif's decision on the authority of the case reported at VI. Mad. H. C. Rep., 401 and the High Court did not go into the question of custom.

In proceedings under Act XXVII of 1860, a custom of this kind has on more than one occasion been admitted before me to exist in particular families.

In S. A. 829 of 1880, a similar custom was set up but not adjudicated on, the final Appellate Court holding that, by openly asserting a hostile title for more than twelve years, the Anandravans had acquired an independent title against the Karnavan. (I. L. R. III. Mad., 212).

In A. S. 59 of 1879, the Appellant probably intended to, though he did not directly, set up this custom. The High Court went on the ground that he had failed to establish an independent title by adverse possession. (I. L. Rep., III. Mad. 141).

The question never appears to have been raised whether the principle of the rule laid down by the Privy Council in the Shevagunga case (IX Moore, 539) is not applicable to Malabar. Shortly stated, that rule is that self-acquired property will descend in the same way as separate property to the nearest heirs of the acquirer. According to this rule, in a Malabar family, the self-acquisitions of any individual member would pass to his branch in preference to his *Tarwad*. It is worthy of observation that Mr. Justice Holloway was of opinion that the law as propounded by him at II. Mad. H. C. Rep., 162 was the law current throughout the Presidency. (Cf. I. Mad. H. C. Rep., 412).

(4). Do self-acquisitions pass to the family of the acquirer by succession or survivorship?

This is a most important question, as upon it depends the question whether a member of an undivided family in Malabar can dispose of his self-acquisitions by will. The authorities are not altogether consistent. So far back as 1843, Mr. Strange held that the acquirer was at liberty to dispose of his self-acquisitions by will. The Provincial Court objected to Mr. Strange's decision and referred the matter to the Sudr Court. The Sudr Court upheld Mr. Strange's view with the following remark:—

" The property in the case under review appears to have " been acquired, not inherited, and as the Court have reason

" to believe that the custom of nepotism are neither uniform " nor general in Malabar, they could not, for the sake of " supporting a local and uncertain peculiarity, sanction a " review of Judgment passed on clear and indisputable " principles of equity. To establish the position claimed by " China Kundi Suban Kutti and supported by the Provin- " cial Court, the Sudr Adalat consider that it would have " been necessary to have proved the existence of some " title to the testator's property during his life and not to " have supposed that the mere circumstance of death " could originate a title which had previously no exis- " tence." (Proceedings of the Sudr Court, 25th September 1843).

In his later years, Mr. Strange was a strong advocate against the validity of Hindu wills.

In their Proceedings of 13th February 1854, the Sudr Court admitted a Special Appeal against the decree of the Civil Court of Tellicherry in A. S. 247 of 1852, on the ground that a Karnavan had no authority to will property to other than his heirs. That was apparently a case in which the person contesting the will was only a Dayadi of the testator.

In S. A. 534 of 1878, the High Court (Innes and Muttusami Aiyar, J. J.) held that a will " was not binding " upon the *Tarwad* of the testator because, according to the " Law applicable to such property, the self-acquisition of " the testator, having been left undisposed of by him during " his life time, was not validly disposed of by the will which " could only take effect after his death."

In S. A. 205 of 1881, however, the same Judges held that in a family governed by *Marumakkatayam* law, the self-acquired property of an individual member, though it became *Tarwad* property at his death, still remains liable for the debts of the deceased acquirer in the hands of the members of the *Tarwad*. (I. L. R. IV. Mad., 150).

Notwithstanding the adverse expressions used in the case reported at II. Mad. H. C. Rep. 162 and the authority of Mr. Justice Holloway, I entertain a hope that when the question is re-considered, the right to devise will be upheld.

(5). General observations.

The ordinary presumption is that property not shown to be separate is joint (X. Moore's Ind. App. 403) and the presumption is of course stronger in the case of a Karnavan who has the management of the family property and family funds. When, as frequently happens, the title deed is in the name of a junior member of the family and the revenue registry in the name of the Karnavan, there is a strong presumption in favor of the property being joint and not separate.

The law as to what constitutes self-acquired property is still unsettled. But a late decision of the Privy Council (L. R. IV. 109) has thrown such doubt on the view taken by the Madras High Court in the cases reported at II. Mad. H. C. Reports, 56, and VII. Mad. H. C. Reports, 47, that it is impossible to hold that they are binding authorities.

Property acquired by several persons by gift becomes joint property in their hands. Whether in Malabar it is liable to partition or not has, as far as I am aware, never been decided.

If the donees were members of an undivided family, it would probably be held that it was impartible and was under the management of the senior male. If, on the other hand, the donees belonged to different families, it would probably be held that partition might be enforced.

In one case (A. S. 676 of 1881) where there had been a voluntary partition of property acquired by a Nayar woman and her children, I held that when one of the branches became extinct, the inheritance devolved in equal shares on the surviving branches.

Similarly in another case (A. S. 64 of 1882) where there was a voluntary partition of joint family property between two branches and at the same time separate property was set apart for the Karnavan, the sole member of another branch, for his life-time, I held that at his death the inheritance devolved equally on the two divided branches.

PART II.

LAND TENURES.

Chapter VI.—Introductory.

Chapter VII.—The Kanam.

Chapter VIII.—The Otti.

Chapter IX.—The Kuri-kanam and Improvements.

Chapter X.—Perpetual Leases.

CHAPTER VI.

Introductory.

In Malabar, it may be said that every man with any pretensions to education is his own conveyancer, and what at first appears to be a complicated system of tenures may be so arranged as to be easily intelligible. The following sketch deals with all the more important forms of transfer of property.

The simplest mode of transfer is the *Verum-pâttam* or simple lease, in accordance with which, after deducting the bare cost of seed and cultivation, the whole of the estimated net produce is payable to the landlord. The tenant is in fact a labourer on subsistence wages, though it suits his landlord to bind him by a contract.

It not unfrequently happens that the rent which he covenants to pay is more than the land can yield, and in this case a burden of debt accumulates round him, and his position is little better than that of a slave. If he incurs his landlord's displeasure, a decree for eviction and arrears of rent follows, and his means of livelihood are gone for ever.

The picture I have drawn is the extreme. There are other *Verum-pâttam* leases in which the good old custom of reserving one-third of the net produce (after deducting the cost of seed and cultivation) for the tenant is retained and the remaining two-thirds are payable to the landlord. Here there is a real contract between the parties, beneficial to both, which may remain in force for years. The aim of the tenant will be to convert his *Verum-pâttam* into a *Kânam-pâttam*, which will give him greater fixity of tenure,

and by dint of judicious presents and subservience to his landlord, or perhaps by ministering to his landlord's want of money, he may in time effect his object.

In some simple leases, a year's rent will be paid in advance at the commencement of the tenancy and the lease will then be termed *Munpâttam—Talapâttam*—or *Kattu-kânam.* On the determination of the lease, the advance must be refunded.

A simple tenant will have no right to compensation for improvements except under special contract. But for a dwelling house which he erects with the express or implied consent of his landlord, he will be entitled to compensation on eviction, even though the word *Kudiyirûp* is omitted in the lease.

2. Next in order of superiority is the *Kânam,* in accordance with which a sum of money or paddy is deposited with the landlord, on which the tenant is entitled to interest, which varies from 3 to 5 per cent. The rent payable to the landlord—*Kânam-pâttam*—will not be more than one-half of the net produce after deducting the cost of seed and cultivation. The tenant is entitled to be left in possession undisturbed for 12 years and to be reimbursed for all unexhausted improvements when evicted.

If at the end of 12 years he renews his *Kânam,* he must pay a fine or premium which, according to ancient usage, ought not to exceed 20 to 25 per cent. of the *Kânam* or one year's rental at the option of the landlord but which in the present day is usually fixed according to the landlord's caprice. After renewal, the tenant is entitled to another term of 12 years.

If during the term of a *Kânam* a further sum of money is advanced by the tenant, it is termed a *Purangkadom,* and he is entitled to deduct from the rent the interest on money so advanced. If the tenant is not prepared to make the advance, the landlord will have recourse to a stranger in

whose favor he will execute a *Mêlkânam*. The *Mêlkânam* holder will be entitled to redeem the *Kânam* holder at the expiry of his term.

Akin to the *Kânam* is the *Panayam* or simple mortgage with or without possession. The terms of a *Panayam* may be similar to those of a *Kânam*, but there are no implied covenants for quiet enjoyment for 12 years nor for compensation for improvements. One form of *panayam* is called the *Undaruthi-panayam*, because it extinguishes itself. Within a term fixed by the parties, both principal and interest will be extinguished by the usufruct and the land will revert free of encumbrance to the mortgagor.

The *Kuri Kânam* or reclaiming lease for planting differs only from the *Kânam* in that no advance is made to the landlord. The tenant has a right to quiet enjoyment for twelve years, and to compensation for improvements which are classed under three heads, *viz.*, Fixtures, Tillages, Plantations.

3. The next form of transfer is the *Otti—Veppu—Palishamadaku*, which is a usufructuary mortgage, the interest on which almost, if not quite, extinguishes the usufruct, and in which nothing but a pepper-corn rent is reserved to the mortgagor. The mortgagee has all the rights of a *Kânam* tenant, and in addition has the right of pre-emption if the landlord wishes to part with his freehold.

Akin to the *Otti* is the *Peruvartham*, under which form of mortgage the land is mortgaged for its full market value, and can only be redeemed on payment of the full market value at the time of redemption. The tenant has the benefit of any rise in the value of land.

4. The last form of transfer to which the other three already mentioned successively lead is the *Attipet* or final sale. But previous to the execution of the final deed of transfer, one or more preliminary stages are resorted to. The forms by which the owner of land parts with everything

except a nominal interest, are termed *Kaividuga-Otti—Otti Kumpuram—Nir mudal—Jenm panayam.*

The better opinion seems to be that when once the preliminary stage is entered on, the equity of redemption is lost, but that should the intending purchaser wish to part with the interest already acquired, the owner has a right of pre-emption.

5. In addition to the four modes of transfer already noticed, grants of land are frequently made either for a consideration or as a reward for services rendered in the form of perpetual leases. The grant, if made to a Brahmin, is termed *Santathi Brahmaswam*; if made to a Sudra of equal or higher caste, it is termed *Anubhavom* or *Sasvitam,* and if some nominal rent or right to renewal fee is reserved, *Karankari* or *Jenm-koru.* If made to a person of inferior caste, it is termed *Adima* or *Kudima.* Grants of temple lands on service tenure, *i. e.,* on condition of performing future services are termed *Karaima.* Grants under any of these forms are said to be resumable by the grantor on failure of heirs in the family of the grantee. Deeds of gift except for religious uses are exceedingly rare.

6. Before concluding this sketch of the different forms of transfer, I will endeavour to illustrate the mode of fixing the *pâttam* or landlord's share.

A land is said to sow 15 paras of seed. Its estimated yield is seven-fold or ...	105	paras.
Deduct for seed 15 paras and for cultivation 15 „	30	„
And the balance or maximum *Verum-pâttam* is	75	„
The minimum *Verum-pâttam* would be ...	50	„
The *Kanam-pâttam* would be	37½	„
Interest at 5 per cent. on a *Kanam* of 100 Rs. would be 5 Rs., equivalent to ...	15	„
And the net rent payable would be ...	22½	„

Interest at 5 per cent. on an *Otti* of 250 Rs.
would be 12½ Rs. or ... ... 37½ paras
And the interest would exactly extinguish the usufruct.

The saleable value of such land would probably be about 12 years' purchase of the net yield, *i. e.*, 75×12=900 paras or 300 Rs.

7. In the succeeding Chapters, I propose to deal separately with

(1). The Kanam.
(2). The Otti.
(3). The Kurikanam and Improvements.
(4). Perpetual Leases.

CHAPTER VII.

The Kanam.

In accordance with modern decisions, a *Kanam* may be defined as a usufructuary mortgage of immoveable property for the term of twelve years (unless some other term is specified) by the conditions of which a definite share of the estimated produce is reserved for the mortgagee as interest on the money advanced and for payment of the Government revenue and the balance is payable in the shape of rent to the mortgagor.

It has always been a matter of controversy whether a *Kanam* should be treated as a lease or a mortgage. It partakes of the nature of both. The point was lately referred to a Full Bench consisting of Turner, C. J., and Innes, Kernan, Kindersley and Muttusami Aiyar, J. J., but it became unnecessary to decide it. The Judgment of Innes, J., in which the other Judges concurred, contains the following observations:—

" If it were necessary to consider the point referred to " the Full Bench, I should hold that for purposes of Limita- " tion, the object for which the tenure was created must be " regarded. In some cases it may be a mere lease, a sum " being advanced as security for rent or for proper cultiva- " tion to be repaid on the expiry of the term. In other " cases, and most frequently, it is created as a lease by way " of mortgage to secure a loan advanced to the *Jenmi* (pro-

" prietor). Rent is payable in the case of every *Kanam* but " all *Kanams* partake also to a certain extent of the incidents " of a usufructuary mortgage. The mortgagee in all such " holdings is assumed to be able to derive from the lands " placed in his possession enough to pay the interest at " least of the money advanced. The discharge of the " principal is not immediately contemplated. The holder of " the *Kanam* therefore pays himself the interest and also " pays the Government tax either directly or through the " landlord. The overplus or a certain fixed amount in grain " or money is paid to the landlord. If, when viewed scien- " tifically, it cannot be wholly regarded as a mortgage, it " certainly cannot be wholly regarded as a lease, as undoubt- " edly the land enures as security, if not for the principal, " at least for the interest of the loan advanced. The " Limitation Act has no provision specially applicable to " tenures of a mixed character and in most cases it would " be obviously improper to apply to such tenures the pro- " visions of Article 118 of the Second Schedule of Act " IX of 1871 (the Act by which this case is governed) and " assign to it a limitation of only six years. For the pur- " poses of limitation when, as is alleged in the case before " us, it is intended as a mortgage, we must apply to it the " law of Limitation applicable to mortgages." (I. L. Rep., III. Mad., 382).

I submit that it is now too late to apply the test proposed. For more than thirty years the *Kanam* has been judicially treated as a usufructuary mortgage. The people have acted on the opinion expressed by the Courts and ought not now to be prejudiced. The High Court do not seem to have fully appreciated the difficulty of holding that the legal incidents of a *Kanam* should vary according to its terms. If it is a lease, it is a lease for 12 years and would require to be registered. Until the lease was legally determined, no lapse of time would destroy the tenure, whilst on the other hand, more than three years' arrears of rent could not be recovered by suit.

The truth probably is that in North Malabar the *Kanam* was really a usufructuary mortgage in its inception. The transaction was one between borrower and lender and the land was security for the loan. It was not usual to grant renewals or exact renewal fees. The rent reserved was a mere nominal sum just sufficient to show that the *Jenmi* had not parted with his seigniorial rights and the tenant was not entitled to improvements unless he had the express authority of the *Jenmi* to effect improvements. On the other hand, in South Malabar, the *Kanam* was originally known by the name of *Ubayam pattam* (land lease). The money advanced was simply a security for the punctual payment of rent and husbandlike cultivation. The rent reserved was a substantial sum and the tenant had implied authority to effect improvements. From time to time, a renewal fee was exacted by the landlord which the tenant could only evade by surrendering his holding.

In the early Reports on Malabar tenures, the distinction between the *Kanam* in North Malabar and the *Kanam* in South Malabar was not sufficiently appreciated and hence arose confusion of ideas which finally resulted in all *Kanams* being treated as mortgages. A native Judge of large experience has expressed to me his opinion that in South Malabar we ought to revert to ancient usage and treat the *Kanam* as a lease for twelve years and that the usage and customs of North and South Malabar in reality differ as widely from one another as the land laws of England and Ireland. To me it appears that it is now too late to revive the ancient practice and whatever harm has been done by official misunderstandings has been done already and cannot be undone.

With these preliminary observations, I propose to consider the whole subject under the following heads:—

(1). Early history of the *Kanam*.
(2). Allusions in official reports.
(3). Absence of judicial decisions up to 1851.
(4). Mr. Strange as Commissioner.

(5). Early judicial decisions.
(6). What constitutes forfeiture.
(7). Essentials of the contract.
(8). Rights of mortgagor.
(9). Rights of mortgagee.
(10). Miscellaneous—

and to show how the legal relation of *Jenmi* and *Kanamkar* has been gradually evolved by the Courts from general principles of Equity.

(1). Early history of the Kanam.

The key-note to the proper understanding of the land tenures of Malabar is the meaning of the three words *Pattam*, *Kanam* and *Jenm*.

Mr. Logan has, I think, hit upon the proper definition of the word *Pattam* which he defines as the *Pâti-varam* or *Pâd's* share of the produce. *Pâd* is an honorific affix as in *Nambudripâd*, *Tirumulpâd*, *Karnavanpâd*, *Tarapâd* or *Tarwad* and was probably applied to the Brahmin or the Sudra family who had acquired a title by occupation. When a family had acquired more land than they could cultivate by their agnestic slaves, some of the lands were entrusted to persons of inferior class who, retaining one-third of the produce for themselves, paid over two-thirds or the *Pâd's* share to the over lord.

Kanam originally meant simply possession and was, I am inclined to think, applied only to the possession of the *Tarwads* who were under certain restrictions as to alienation. The superior class of landowners such as the Devasam, the Brahmin family and the King's family (Kovilagam) were under no restrictions whatever and might alienate the land by gift or sale. The form of transfer was termed *Attipet* or *Nir-attipet*, lit: *that which is obtained completely* or perhaps *that which is obtained by contact with water.* The *Nir-mudal* or property in the water was the last right with which the proprietor parted.

The word *Jenm* or *Janmam* meant birthright and came into use in connection with the word *Kanam*. In former times, the *Tarwads* held their lands free of all taxes, but they were under an obligation to render personal military service. In process of time, the *Tarwads* found themselves too weak to resist the exactions of the Rajahs and Chieftains and for their own protection placed themselves in feudal relation with some superior lord who became the *Jenmkar*. The arrangements entered into between the *Jenmkar* and *Kanamkar* probably varied. In some cases a third of the produce was assigned to the *Jenmkar* and two-thirds were the *Kanamkar's* property. The *Kanam-pattam* represented the one-third paid by one who had a right of occupancy, as the *Pâd's* share and was opposed to the *Verumpattam* or two-thirds paid by one who had no such right of occupancy. In other cases, a fine or premium was paid to the *Jenmkar* as the price of his protection. It is easy to see how this developed into the system which we found in force in 1792, A. D. Where the Rajah or Nâdvari waxed strong and the *Tarwad* weak, the position of the latter was simply that of lessee or mortgagee. Where the *Tarwad* waxed strong, it took the earliest opportunity of repudiating the claim of the Rajah or Nâdvari and asserting its own independence. If full justice had been done at the time of the first British settlement of Malabar, it would have been necessary to distinguish between the hereditary Sudra *Kanamkar* whose military services were dispensed with and who ought to have been treated either as full owner or at least as having a permanent right of occupancy and the comparatively recent *Kanamkar* (Mopla or Tíen or perhaps Nayar) who had no rights in the land except such as he derived from the *Jenmkar*. But all were treated alike as lessees or mortgagees. Probably, there was a large class who had been originally *Pattamkars* and had been converted into *Kanamkars* and practically held the position of tenants having a permanent right of occupancy subject to a payment of a fine at stated intervals and to rendering the usual homage at the time

of Onam and Vishu to the *Jenmkar*. Or again, the *Kanamkar* might have ministered to the wants of his *Jenmkar* and supplied him with funds for the performance of some marriage ceremony or the purchase of fresh landed estate. This placed him in a still firmer position as he was entitled to interest on the money advanced as a charge on the land.

(2). Allusions in official reports.

In his report on Land Tenures of Malabar, 1801, which is to this day the standard work on the subject, Major Walker treats of the *Kanam* as a lease. At page 8 he writes: "The usual period of a lease is limited from three to six "years. The *Paramba*, if the parties think necessary, under-"goes a new inspection, as the produce may have increased "or diminished. The *Pattam* is fixed on renewing the *Kara-"nam* (deed). On the renewal of his lease the *Pattamkar* "(tenant) makes an advance of half the *Pattam* to the "*Jenmkar* (landlord).

"Although this is the customary period for leasing "lands, if it is agreeable to the parties, the number of years "may be extended or reduced at their pleasure, but a lease "in every case must expire with the life of the *Jenmkar*. It "must be renewed by the heir. The *Pattamkar* must pay "an entire year's *Pattam* and suffer a deduction or make an "addition of thirteen fanams per cent. on the *Kanam* money. "The *Karanam* will be then executed according to the "original equivalent or *Kanam*. The deed must also be "renewed on the death of the *Pattamkar* liable to the above "burthens to his family, should the *Jenmkar* be disposed "to continue the lease to them; but this is at his option, "as he may on its expiration in any manner dispose of the "*Paramba* as shall be most agreeable to himself."

Certain minor differences when the Rajah is the lessor are then pointed out and at page 9 Major Walker proceeds:—"In case the *Jenmkar* changes his *Pattamkar* or "demands the *Paramba* back from his *Kudian* (tenant) he "must repay the original *Kanam* with the interest and also

" *Kurikanam* or a sum of money equal to the expense or
" value of the improvements introduced by the tenant.

* * * *

" But should the *Kudian* have neglected the estate and " the produce by that means is diminished, the loss will be " made good to the *Jenmkar* from the *Kanam*. On either " of these events, people are assembled to ascertain the " amount due to the parties."

In an extract from the General Report of the Board of Revenue dated 31st January 1803, the *Kanam-pattam* is thus described:—

" *Kanam-pattam* or tenure by mortgage. Here a sum " of money is given by the mortgagee for the occupancy of " the land made over to the mortgagor. If the produce " exceed the interest of the sum lent, the *Kanamkar* " (mortgagee) pays the overplus to the mortgagor and *vice* " *versâ*. The mortgagor generally neglects to pay the " overplus until it accumulates to an amount which pre-" cludes redemption though this is always in his option. " Hence the *Kanamkar* does not improve the land with the " same confidence as if it were his unalienable property."

Again in a Report of the Collector Mr. Thackeray, dated 4th August 1807, the *Kanam-pattam* is thus defined:—

" *Kanam-pattam* is when the landlord lets his land " receiving a sum in advance from his lessee which may be " considered either as a loan or as security for the due pay-" ment of the rent. The tenant retains so much of the rent " as will discharge his claim for interest and pays the " remainder to the proprietor."

In his Report of 13th September 1815, Mr. Warden, Collector of Malabar, treats the *Kanamkar* simply as a mortgagee who, after he has entered into possession is invested with every right of proprietorship except that of alienating the land by sale. He then proceeds to describe the system of renewals thus:—

" It was a prerogative inherent in the *Jenm* right

" that the *Kanamkar* should renew his *Kanam* deed after the " lapse of a certain number of years. The renewal entitled " the *Jenmkar* to a remission of a fixed percentage on his " original debt. By such periodical renewals and concomi- " tant deductions, the land in process of time became dis- " encumbered of its *Kanam* and the lease naturally fell in " unless the person in succession may have been satisfied " with levying a fee in money instead of granting a renewed " lease with a reduced *Kanam*. I have never seen a bond " in which the time for renewing it was specified or the least " allusion made to that privilege. It seems to be sufficiently " well understood as an established custom of the country " and formed the great prerogative of the *Jenmkar* which " gave to him and his heirs a never ceasing interest in the " *Jenm*. It always enabled them to borrow money and in " the course of time the land reverted to the family as it " were in a regenerated form.

* * * *

" Among the Rajahs, the practice was to require their " tenants to renew their deeds at the accession to the Raj of " every new head. In the Cochin territory, such renewals " have occurred three times in the last seven years and must " have been severely felt if strictly enforced.

" In Major Walker's Treatise, it is noticed that a lease " *in every case must expire with the life of the Jenmkar and* " *that it must be renewed by the heir*. There is an exception " however to the rule, according to my information, which " provides for the old lease running a specific duration of " time before the heir can obtain a renewal. The justness " of it argues in its favor to prevent the hardships a *Kanam-* " *kar* would be liable to by a rapid succession of lapses in " his *Jenmkar*, for the deduction that takes place at all renew- " als is 13 per cent. of the *Kanam* beside the payment of " an entire year's rent to the *Jenmkar*.

" In case the *Kudian* should of his own accord be " desirous to return the *Paramba* to the *Jenmkar*, he must

"sustain a deduction of 20 per cent. on the sum in deposit. "This is called a *Sakshi* (lit: a witness) or a fee for liberty "to return an estate the benefits of which he has been "sometime in enjoyment of.

*   *   *   *

"The *Jenmkar* may revoke a lease before it expires "at any period, excepting at the season of produce, on pay-"ing the *Pattamkar* his *Kanam,* the expense of executing "the *Karanam* and double the value of *Kurikanam.*"

In his Report on the District of Malabar, 1822, Mr. Græme writes, § 1,435 :—

"It seems to have been considered that lands were "expressly and for the first time made over to the mort-"gagees to discharge an existing debt contracted from "causes unconnected with the occupation of the land, but "the fact is, I believe, that the money was almost inva-"riably borrowed from tenants who were previously in "possession. The origin of these loans seems to have been "that the tenant should give a year's rent in advance to "the proprietor either as a necessary security for payment "or as a *bonus* for the profit he was allowed to enjoy, and "the extravagance or necessities of the proprietors induced "them to continue to borrow till the rights and interests of "the mortgagee in the land became stronger than those of "the proprietor."

And again, after describing the usual terms of the deed, he writes, § 1,442 to 1,501 :—

"Though not specified in the deed, it was formerly "customary to give from 3 to 5 per cent. on the amount of "the principal to the proprietor upon making out this deed, "as a fee under the name of *Oopoo* or signature and further "the mortgagee had to give 2 per cent. under the denomi-"nation of *Tooshee* or the point of the iron style used for "writing the deed.

*   *   *   *

" But these payments have been for some time discon-
" tinued in practice in most places : they have only reference
" to a state of things in which the interest of the mortgage
" debt bore little or no proportion to the annual rent yielded
" by the land in the possession of the mortgagee, and are
" too excessive to be applicable to the altered circumstance
" of the interest of the debts being equal to the *Pattam*
" receivable by the mortgagee.

" With respect to this deed, it is understood that if the
" mortgagee insists upon payment of the mortgage debt,
" the mortgagor has a right to deduct from the principal
" from 10 to 20 per cent., the rate depending upon local
" custom under the name of *Sakshi* and he is under no
" obligation to return the fees of *Oopoo* and *Tooshee* which
" he has received.

" If the mortgagor refuses payment upon demand, the
" mortgagee has a right to withhold the whole of the *Pattam*
" yielded by the land in his possession until his claim is
" satisfied, or he may mortgage the land or sell his interest
" in it to another. He has no claim upon any other but the
" particular property mortgaged belonging to the mortgagor
" or any right of causing the arrest of the person of the
" mortgagor.

" If the mortgagor of his own accord tender payment
" of the mortgage debt contrary to the wish of the mortgagee,
" he must pay the full amount without deduction for *Sakshi*
" and if the mortgagee has not held possession for three
" years, the mortgagor must return to him the *Oopoo* and
" *Tooshee* fees which he has received.

" If the mortgagee under this deed fails to pay the
" proprietor *Porapad* or residue after deducting the mort-
" gage interest from the *Pattam,* he forfeits all claim to the
" debt and the proprietor has a right to demand restitution
" of the land.

" The *Poleechellootoo* (renewal fee) payable under this
" deed seems intended as an equivalent for the tenant's

" profit named *Chair labam* which he has derived from the " land. On the demise of the tenant, it is a fine of entry to " his successor. The amount of it and the frequency of its " renewal seem to depend upon the quality of the soil and " the quantity of *Chair labam* which has been enjoyed by " the tenant. The latter is generally ascertained by the " competition of neighbours who offer better terms to the " proprietor.

" In the Northern Division, the practice of *Sheelakas* " or taking one year's *Pattam* once in three or four years or " a quarter or a third of the *Pattam* every year as an " equivalent of the *Chair labam* has prevailed in lieu of " *Poleechellootoo*."

After pointing out that when the deed relates to plantations and not to rice land the tenant has a further right to *Kurikanam* or the fixed value of the trees and the *Ulewoo* or the expense of preparing the garden in conformity with the custom of the village, Mr. Græme proceeds, § 1,501 :—

" In the deeds as well for rice as garden lands, the pro-" prietor of the land has a right of *Poleechellootoo*, that is, " to renew the deeds every twelve years or when the *Jenm-" kar* dies, his successor may demand the *Poleechellootoo* (or " tearing up of old bonds and the making of new) by which " he is entitled to a deduction of *Sakshi* and *Oopoo* and " *Tooshee* from the mortgage debt or to receive the amount " of it in hand from the mortgagee. It is understood that " the proprietor has not the right of renewal within five or " six years after the last renewal."

Here we have the origin of the twelve years' term which was introduced by the Courts in favor of the tenant. In other words, the tenant's right now recognized by the Courts is based on the custom that the landlord might claim renewal fees at the end of twelve years.

(3). Absence of Judicial decisions from 1800 to 1853.

The absence of any decisions in the Courts in suits between *Jenmkars* and *Kanamkars* for the first sixty years

of the British occupation of Malabar may be accounted for in one of two ways. Either the evicted *Kanamkar* was afraid to oppose his *Jenmkar,* or he had acquired a quasi-permanent right of occupancy. Possibly both influences were at work in different parts of the District.

It is curious to note that as far back as 1829, in the neighbouring state of Tranvancore, instructions had been issued to the Courts as to the mode of settling disputes between the jenmies and their tenants. The principles then laid down were subsequently re-affirmed in a Proclamation of 8th August 1867. Those principles are that a tenant is not liable to eviction so long as he pays his rent and customary dues, that the rent may be re-adjusted at the customary periods, that the tenant may be evicted if he withholds payment of rent for twelve years, and that if the jenmi refuses to receive rent as it falls due, the tenant may deposit it in a Court of Justice. The parties are at the same time at liberty to make their own contracts as to the terms of the tenancy, &c. The terms of the Proclamation, however, have been held by the Courts only to refer to the ancient jenmies of Malabar.

The position of the *Kanam* tenant in Malabar, until Mr. Strange and the Courts interfered in his behalf was, it appears to me, an anomalous one. In law, he was little more than a tenant at will and liable to capricious eviction; in practice, so long as he kept on good terms with his landlord, he had a permanent right of occupancy.

The British occupation of Malabar was injurious to the friendly relations which had hitherto existed between landlord and tenant. In the first place, the British Government required a fixed land revenue and this was foreign to the customs of the people. It had been introduced by Tippoo, but was always regarded as a tyrannical impost. Anxious to do no injustice to the cultivator, the Government made a liberal estimate that the cultivator was entitled to one-third of the net produce and the *Jenmi* to two-thirds and decided

to claim as revenue three-fifths of the *Jenmi's* share. This was fair enough in principle, but in practice it was the cultivator, not the *Jenmi*, who suffered. It was hardly likely that if a land yielded a net income of 75 paras, the *Jenmi* would allow

the tenant	25 paras
and the Government	30 „
and himself be content with	20 „ .

He would in some mode or other secure for himself a goodly proportion of the cultivator's share by forcing terms on the cultivator which, though ruinous, he was bound to accept or give up his land to others.

In the second place, the result of the British occupation of Malabar was to let loose a number of Nayars and others who had hitherto followed arms as a profession and who had to fall back on agriculture as a means of subsistence. As competition for the best lands increased, as the former hold of the *Jenmis* on their dependants relaxed, as the lower castes began to learn that they too had rights as citizens, agrarian discontent sprung up and there was but a short step from agrarian discontent to agrarian outrage. It was but natural that with the class feeling which already existed between the Hindu and the Mopla, each should endeavour to assert his own rights and it is the opinion of many that the origin of the Mopla outrages was more than anything else a restless feeling engendered by tyranny on the part of the landlords.

(4). Mr. Strange as Commissioner.

In February 1852, Mr. Strange, then a Judge of the Sudr Court of Madras, whose experience of Malabar extended over more than twenty years, was deputed as a Special Commissioner to enquire into the causes of the Mopla outrages. His report is dated 25th September 1852. On the part of the Moplas, exactions by Hindu landlords were assigned as one of the chief causes of the outrages. Mr. Strange recorded his opinion (p. 20) that " though instances may and do arise " of individual hardship to a tenant, the general character

"of the dealings of the Hindu landlords towards their "tenantry, whether Mopla or Hindu, is mild, equitable and "forbearing."

That is an opinion which no one at the present day would hazard, and I cannot avoid the conclusion that Mr. Strange was not well informed on the subject. Speaking of the renewals of leases, Mr. Strange writes (p. 23): "The "renewals should not be oftener than once in twelve years "and the complaint is that they are resorted to at much "shorter intervals. From the enquiries I have made, I "do not believe that grounds exist for this complaint to any "serious extent."

In para. 69, Mr. Strange speaks of the land tenures of Malabar. He writes:—

"It is obviously highly essential that the tenant should "not be disturbed from possession arbitrarily and at unduly "short periods, and *the recognized rule is that if he should "have paid a fine for his lease, it should endure for twelve "years under certain reservations, as when the landlord, if a "Rajah, dies when he should renew with his successor, or "when the landlord requires more money on the land and "the tenant will not provide it and it is obtainable from "another; or when rents are not paid.*"

In commenting on this paragraph Mr. Conolly, the Collector, who also had had a long experience of Malabar, agrees with Mr. Strange that, according to the spirit and intention of the old laws, twelve years is the proper duration for a lease.

And the Sudr Court, in affirming the same view in their Proceedings of 13th February 1854, say:—

"In all cases in which tenants on taking leases of rice "lands may have paid a fine to the landlord, the title which "this gives the tenant to a definite term for his lease should "be invariably upheld notwithstanding that such terms may "not have been expressed in the lease; and as regards

"*Paramba* lands, the tenant's right to occupancy for a "term of years should be respected whenever such right "obtains."

I look upon Mr. Strange as the author of the twelve years' term. It had before this been customary to levy a fine or premium at intervals of twelve years, but it had also been customary to evict unsatisfactory tenants at any time. The new rule was a compromise between a recognition of the tenant's permanent right of occupancy and of the proprietary right of the landlord.

I will now show how eagerly the Courts adopted Mr. Strange's rule, and how it soon came to be regarded as part of the customary law of Malabar.

(5). Early Judicial decisions.

The twelve years' term was not regarded as part of the common law of Malabar up to 1853.

In A. S. 169 of 1851 (Calicut) the Civil Judge, whilst admitting that there were precedents for securing twelve years' possession to a tenant from the renewal of his mortgage deed, held that they did not apply when the tenant was in arrears with his rent. (Selections from Records of Madras Government, No. 49, p. 1).

The next case is A. S. 75 of 1853, decided by Mr. Cook as Sub-Judge of Calicut on 23rd May 1853. The plaintiff was a purchaser of the *Jenm* and sued to redeem a *Kanam* demise granted in 1850. The defendant pleaded that while conducting himself in conformity with the *Jenm* and *Kanam* rules, there was no reason for him to restore the *Paramba* within twelve years. The Munsif held that it was contrary to the custom of the country to call upon him to restore the *Paramba* so soon after the renewal of the last deed. On appeal, Mr. Cook upheld the Munsif's decree remarking.—"The Court will never countenance capricious "ejectment, while at the same time it considers it a duty to "protect the proprietor in all his just rights."

In the following year, in A. S. 36 of 1854, the same Judge (Mr. Cook) on 10th July 1854 makes use of stronger language. " The Court is of opinion that the plaintiff had no " adequate reason for instituting the suit for restoration of " the land from defendant. True it is optional with a *Jenmkar* " to sue for restoration, but he must show grounds for so doing, " if within the usual allowed period of 12 years:" and again, " unless the *Kanamkar* fails in his engagement either to pay " rent or unnecessarily damages, alters, or otherwise destroys " the mortgaged land, he has a right to expect he shall not " be removed before the expiration of the 12 years."

These are the earliest expressions of judicial opinion which I have been able to discover as to the 12 years' term.

On 10th June 1854, Mr. Cook had given a decree for redemption although the suit was brought within twelve years. On special appeal, the Sudr Court (Messrs. Hooper, Morehead and Strange, J. J.) remanded the suit on 15th August 1855 with the following remarks :—

" The Court are of opinion that the question of usage " involved in the suit has been improperly dealt with by " the Lower Court. It is not denied that it is the prevail- " ing usage in the country of the parties to the suit that the " mortgages should run for a period of 12 years, before the " expiration of which the mortgagee cannot be displaced. " It is objected that proof is wanting that the mortgagee paid " a fee for the renewal of the mortgage. It appears to the " Court that the deed having been renewed, every necessary " condition for renewal must be held to have been ful- " filled." (Sud. Dec. 1855, p. 137).

And again on 27th February 1856, on special appeal from a decision of Mr. Collett (who succeeded Mr. Cook as Sub-Judge of Calicut) dated 11th November 1855, the Sudr Court say :—

" The Sub-Judge has omitted to take notice of the " plea raised by 3rd defendant, one of the sub-mortgagees,

"that a mortgagee is not liable to be displaced until after "a tenure of 12 years, such being a recognized usage of the "country having the force of law."

Thenceforward the custom was established, and on 5th August 1856, the Sudr Court recorded Proceedings defining the various tenures in Malabar and the conditions attending each of them, but I cannot find that these Proceedings were ever circulated.

Perhaps the vigorous language of Mr. Holloway, who had succeeded Mr. Collett as Sub-Judge of Calicut, did more to establish the rule than anything else. Extracts from his Judgments are appended:—

"I deem it requisite to notice the doctrine asserted by "the plaintiff in appeal that there is no injustice in procur-"ing the restoration of land on payment of the sum advanc-"ed by the tenant. I utterly repudiate this doctrine. No "*Jenmkar* can in less than 12 years demand the restora-"tion of the land of a *Kanamkar* except in case of the "breach of express or implied covenants by such *Kanam-*"*kar*. Such a protection the custom of the country pro-"vides against the grasping avarice of proprietors, and it "is only the strict preservation of the custom which can "prevent this species of tenure from being a monstrous "fraud in which the weak will always be the prey of the "strong." (Zillah Dec., Calicut Sub-Court, December 1855, p. 22).

"The record stood and now stands with an admission "on the part of the Appellants in this case that the person "whom they sought to oust had in 1845-46 obtained a "*Kanam* claim of a certain amount from the *Jenmi* one "of themselves. In 1851-52, they seek to eject him on the "ground that they have been able to make a better bargain "with some one else. Now the custom of the country "makes every demise on *Kanam* a covenant for a quiet "enjoyment of 12 years' duration. It is not in the power "of the owner of the land to enhance his demands during

" that period, and no breach of his covenants on the part " of the *Kanamkar* was then alleged or proved or has now " been alleged and proved." (Zillah Dec., Calicut Sub-Court, March 1856, p. 13).

" When a deed conveying a *Kanam* or any other claim " has been duly executed, the proof of any intrinsic defect " in the claim which it purports to convey lies upon the ex-" ecutor of the deed. As his own deed, the rule of law is to " construe it most strongly against him. On this ground, " therefore, the question of earnest money cannot avail the " Appellant. I, however, entertain no doubt that indispu-" table proof of non-payment of earnest money would not " invalidate a *Kanam* deed. Such payments vary in " amount and, in many cases, none such is made. When it is " made, it is an accident and not an essential of the contract " and is wholly irrelevant to the question of the validity of " a deed, although it may sometimes, according to the custom " of the country, be a question when for other adequate " cause a *Kanam* is extinguished before the lapse of the pre-" scribed period. Even then, it is a question for the benefit " not of the lessor but of the lessee, who although a defaulter " is, according to authorities, entitled to much respect, " entitled to a return of a portion of the earnest money." (Zillah Dec., Calicut Sub-Court, August 1856, p. 1).

(6). What constitutes forfeiture.

One of the earliest questions which came before the Courts for decision was in what circumstances the right to hold for 12 years was forfeited. In their definition of a *Kanam* tenure, the Sudr Court stated—" The mortgagee has " possession recovering the interest of money he has advanc-" ed from the produce of the land and paying over the " nett profits to the landlord. Should he fail in the last " respect, the amount is placed to the landlord's credit " when the mortgage is paid off, allowance being made on " the other side for any improvements which the mortgagee " may have effected. Failure to pay over the nett proceeds

" regularly to the landlord will not give the latter power to " redeem his land before the expiration of the period stipu- " lated or that of 12 years, unless there is an express condi- " tion to that effect in the deed. Any attempt, however, on " the part of the mortgagee to defraud the landlord and " usurp the property will give the latter that power."

Mere non-payment of rent therefore was held not to work a forfeiture. But the Sudr Court very soon modified their view much to the chagrin of Mr. Holloway who was then Sub-Judge of Calicut. In A. S. 244 of 1855, Mr. Holloway writes :—

" If the case were of the first impression, I should con- " firm the Munsif's decree, because I am of opinion that the " nature of the contract of *Kanam* is not such as to render " the right to hold the land so dependent upon the payment " of rent as that the estate is defeated by failure to pay. " I am clearly of opinion that the advance of the money " is the condition and that arrears of *Porapad* are the sub- " ject for a suit. This remedy too would be amply sufficient, " for the penalty of costs and interest would be a sufficient " punishment. I am quite clear too that the custom of " Malabar never regarded one failure to pay as a ground " for defeating the contract. It is obvious that there are " other conditions, and that the mere condition of payment " of *Porapad* does not go to the whole of the considera- " tion, and the plain rule of law is that, under these " circumstances, the conditions are independent and not " dependent conditions. The Sudr Court has, however, in " unqualified terms, in its extract of Proceedings dated " 1st October 1856, remanding Appeal Suit 208 of 1854, " laid down that failure to pay *Pattam* operates the avoiding " of the whole *Kanam* claim. I am bound by their decision, " although dissenting entirely from the doctrine on which it " is based. I hold the right of 12 years' enjoyment not " dependent on the payment of rent merely and therefore " not defeasible by failure to pay. The conditions are

" numerous on which the 12 years' quiet enjoyment are held " —the enjoyment of the *Kanam* money by the demisor " without interest, the obligation on the demisor not to act " against his demisee's title, the obligation on the demisee " not to commit waste and to treat the land in a husbandlike " manner. To defeat the estate by a mere failure to pay the " *Porapad* is, as it appears to me, both opposed to legal " principle and is the fruitful nurse of fraud of every descrip- " tion." (Zillah Dec., Calicut, December 1856, p. 15).

Again and again, as Civil Judge of Tellicherry, he recorded his opinion but in vain.

" There is no doctrine in my judgment so unsatisfac- " tory and more requiring equitable relief but I am bound " by it."

" I do hope that some day, on more mature considera- " tion, they (Sudr Court) will add to the many beneficial " rulings with respect to Malabar, which have of late years " emanated from them and apply this doctrime solely to " cases in which there is refusal to pay *and* the setting " up of the title of another."

It was not until 1862 that a Bench of the High Court, consisting of Messrs. Strange and Frere, re-considered the former ruling and held that mere non-payment of rent would not work a forfeiture. (I. M. H. C. Rep. 112).

This was re-affirmed by the same Judges in S. A. 111 of of 1862 and by Messrs. Frere and Holloway in S. A. 84 1862.

As soon as this decision became known, the wily *Jenmi* proceeded to contract himself out of the rule. He intro- duced into his *Kanam* deed the stipulation that if rent was in arrears, the tenant should surrender when called on *or* simply that the tenant should surrender on demand. The first of these stipulations was treated by the High Court as a penalty against which the Courts ought to relieve (VI. M. H. C. Rep. 258). The second of these stipulations was held by Mr. Sharpe to be enforceable, and his decision was

upheld by the High Court in S. A. 32 of 1874 (not reported). Lately, a division Bench of the High Court, consisting of Messrs. Kernan and Muttusami Aiyar, have expressly so decided. (I. L. Rep. II. Mad., 193).

It is submitted that in every case of forfeiture, there ought to be a refund of a proportionate share of the renewal fees, which are calculated on the understanding that there is to be quiet enjoyment for 12 years.

This principle was recognized by Mr. Holloway as "based upon authorities entitled to much respect" (Zillah Dec., Calicut, August 1856, p. 1) and by Mr. Sharpe in the case above referred (S. A. 32 of 1874) and by myself on several occasions.

As regards the other circumstances which would work a forfeiture of the 12 years' term, there does not appear to have been any difference of opinion. Denial of the landlord's title has always been held sufficient. (I. M. H. C. Rep. 445 and II. M. H. C. Rep. 109). Fraudulent conduct on the part of the tenant derogating from his landlord's title, commission of wilful waste, failure to cultivate in a husbandlike manner, have in various cases been held sufficient.

In A. S. 157 of 1855 (Calicut) Mr. Holloway as Sub-Judge says:—

"While the landlord covenants to allow 12 years' quiet "enjoyment, the tenant on his part covenants to do nothing "against the permanency of his landlord's rights, and if as "alleged a pond essential to the irrigation of these lands "has indeed been destroyed, the tenant would by such act "lose the benefit of his covenant and would be compellable "to return the land." (Zillah Dec., Calicut Sub-Court, August 1856, p. 20).

And in A. S. 211 of 1859 (Tellicherry) Mr. Holloway as Civil Judge says:—

"I am bound by the practice of Malabar to hold that "under such circumstances the *Jenmi* has a right to termi-

" nate the contract for 12 years' quiet enjoyment, which is " dependent upon the adhesion of the tenant to his cove- " nants. Waste, and cutting trees without permission is " obviously waste, is a breach."

On the authority of a passage in Major Walker's treatise, it has been argued that there is a forfeiture if the tenant burn or bury a corpse in a *Paramba* without the consent of the *Jenmi*. But this was negatived by Mr. Reid after consulting his native Sub-Judge in A. S. 350 of 1873 (Tellicherry). Cutting trees in a *Paramba* will amount to waste if they are the property of the *Jenmi*, or if the cutting was an injury to the *Jenmi's* reversion. But if the trees were the property of the tenant and he replaces them by others, that is a kind of permissive waste which the custom of the country allows.

(7). Essentials of the contract.

It appears always to have been held that non-payment of earnest money or renewal fees does not invalidate a *Kanam* deed which has been duly executed and delivered, and that such payments are an accident and not an essential part of the contract (Zillah Dec., Sub-Court, Calicut, March 1856, p. 13: July 1856, p. 37: August 1856, p. 1: March 1857, p. 36.)

Whether an agreement to renew is a sufficient answer to a suit for redemption, is a question which has come before me on several occasions. Of course the tenant must show that he has given consideration for the agreement and that he is entitled to specific performance. If the agreement is in writing and acknowledges receipt of more than 100 Rs. for renewal fees, it requires registration.

It frequently happens that a *Kanam* deed and counterpart are drawn up by the parties and registered but that they are not exchanged. Sometimes they are kept by the parties who executed them; at other times they are placed in the hands of a third party. Questions then arise as to the relation of the parties. The new contract is not complete

until delivery of the deed; but if the mortgagee has done all that it was necessary for him to do to obtain delivery, a Court of equity is, I submit, bound to uphold his right to possession. The dispute between the parties is usually in respect of some exaction claimed by the *Jenmi* in addition to the customary fee of 20 to 25 per cent. on the *Kanam*, but I see no reason why the Courts should not in such cases enquire whether the customary fee has been paid.

(8). Rights of mortgagor.

The rights of the mortgagor are to redeem at the end of the term on payment of what is due, to receive payment of the rent fixed as it falls due, or to deduct it from the *Kanam* if it is in arrears at the time of redemption, and to create what is called a *Melkanam* or higher mortgage.

(*a*). In decrees for redemption, it is usual to apportion the *Kanam* equitably among the mortgagee and his sub-mortgagees. The rent is a first charge on the *Kanam*; then an admitted sub-mortage; and lastly the original mortgage. Nearly every case of redemption is brought into Court as there are the conflicting interests of mortgagees and sub-mortgagees to be adjudicated on, and the parties can seldom agree as to the compensation payable for improvements. The period allowed for redemption under the present Statute of Limitations is sixty years from the time when the right to redeem or to recover possession accrues, *i. e.*, in an ordinary *Kanam* when 12 years have elapsed from the date of the *Kanam*. A new period of limitation is allowed if, before the expiration of the period prescribed for a suit, an acknowledgment in respect of the right to redeem has been made in writing, signed by the party against whom the right is claimed or by some person through whom he derives title. The acknowledgment need not be addressed to the mortgagor and it may be signed by an agent duly authorized.

Under the old Statutes, the sixty years were reckoned from the date of the mortgage, but an acknowledgment

signed by the mortgagee was sufficient to give a new period from the date of the acknowledgment. If the right to sue was barred when the present Limitation Act came into force, it cannot be revived. What will constitute an acknowledgment is a question that is frequently before the Courts. It has been held that the deposit by the tenant under his signature of the *Kanam* deed in the Collector's office at the time of the pymash of 1824 is a sufficient acknowledgment. See authorities collected in A. S. 103 of 1882 (South Malabar). It has also been held that an assignment of his mortgage right by the tenant under a deed describing the nature of that right is a sufficient acknowledgment. The acknowledgment must be made before the expiration of the period prescribed for a suit, and it of course lies on the person seeking to redeem to prove that it was so made. But it is submitted that direct evidence of the date of the original mortgage need not be adduced, and that if it is shown that the mortgage was a subsisting mortgage at the date of the acknowledgment, it will be presumed that the acknowledgment was within time.

(*b*). The mortgagor is not entitled to an account if the rent payable is specified in the *Kanam* deed. He is at liberty to recover the rent due by separate suit, but if he adopts this course, he is limited to the recovery of three years' arrears. Or he may wait till the period of redemption arrives and then claim to set off the arrears of rent against the *Kanam*, and compensation payable for improvements. (I. Mad. H. C. Rep. 112).

(*c*). If the *Jenmi* requires a further advance on the security of his property, it is usual to apply to the *Kanam* tenant. The further loan is termed *Purankadam* and becomes an extra charge on the property which must be repaid at the time of redemption. A fresh arrangement will also be made as to the rent payable.

It was formerly the impression that a *Kanam* tenant was entitled to the option of making any further advance,

and that a *Melkanam* to a stranger was invalid unless this option was given and declined.

In 1854, the Sub-Judge of Calicut held that the Samudayam of a Devasam had authority to grant a *Melkanam* more than 12 years having elapsed from the date of the original *Kanam* and the rent being in arrears. (Zillah Dec., Calicut, July 1854, p. 8, and Selections from Records of Madras Government, No. 49, p. 12).

The whole question has been discussed at length in my finding on an Issue referred for trial in S. A. 752 of 1881, which I will quote at length:—

" The issue referred to me for trial is, " whether by " the usage of Malabar, the 1st, 2nd and 3rd defendants " were disentitled to grant plaintiff a *Melkanam*, without " offering 4th defendant the option of making a further " advance in consideration of a renewal of the *Kanam*.

" No evidence was adduced by the parties as to the " custom, and it only remains to deal with it on the autho- " rities.

" The question may be almost said to be concluded by " authority.

" In Second Appeal 129 of 1862, the High Court (Frere " and Holloway, J. J.) held that the first mortgagee had a " right to a hold for twelve years, but they tacitly admitted " that the second mortgagee might pay him off after that " period. (I. Mad. H. C. Rep. 296).

" In Second Appeal No. 186 of 1862, the High Court " [Scotland, C. J., and Frere, J.] held that in the case " of an *Otti* tenure, it was settled law, that the first mort- " gagee was entitled to the option of making any further " advance required by the *Jenmi* (I. Mad. H. C. Rep. 356). " That decision was based on a decision of the Sudr Court, " which is reported in the Sudr Dec. 1860, p. 249. Nothing " was then said and in none of the Sudr decisions was it " ever suggested that the right to make further advances " was also an incident of a *Kanam* tenure.

" Recently in Second Appeal No. 154 of 1881, the High " Court (Turner, C. J., and Kindersley, J.) held that there is " no authority to support a *Kanamkar's* claim to the privilege " of making further advances. (I. L. Rep. III. Mad. 246).

" The only authorities on the other side, as far as I know, " are :—

" S. A. 27 of 1862 in which the High Court (Scot- " land, C. J., and Phillips, J.) accepted the law as laid down " by the Principal Sudr Amin (Mr. Pereira). The only real " value of that decision is, that the Nayar Vakil who appear- " ed for the appellant does not seem to have disputed the " Principal Sudr Amin's law. (I. Mad. H. C. Rep. 13).

" A suggestion made by the High Court (Scotland, " C. J., and Collett, J.) in S. A. 474 of 1868 (not reported). " The Judgment says, " Though it may be a fact that the " period of 12 years of the defendant's *Kanam* demise has " now expired, yet he may have a perfect defence on the " merits to a suit now by a *Melkanamkar* as plaintiff seek- " ing to eject him.

" In para. 59 of Mr. Strange's report on affairs in " Malabar, dated 25th September 1852, (Correspondence on " Moplah outrages, Vol. I, p. 470) is the following passage :—

" It is obviously highly essential, that the tenants " should not be disturbed from possession arbitrarily and " at unduly short periods, and the recognized rule is, " that if he should have paid a fine for his lease, it should " endure for twelve years, under certain reservations as " when the landlord, if a Rajah, dies when he should renew " with his successor; or when the landlord requires more " money on the land and the tenant will not provide it and " it is obtainable from another, or when rents are not paid.

" The meaning of this I take to be, that as a general " rule, there was an implied covenant in every *Kanam* for " quiet enjoyment for 12 years, but that forfeiture of the " term might occur from one of three causes.

" (*a.*) Death of the grantor, if a Rajah.

" (*b.*) Refusal to make further advances *during the* " *pendency of the term.*

" (*c.*) Non-payment of rent.

" Nothing is here said about the right of the *Kanamkar* " to hold over after the expiry of his term.

" The origin of the *Melkanam* was, I believe, as " follows:—

" In ancient days, the *Kanam* was simply a lease for " three to six years, with a year's rental paid in advance, " and at the end of the term fixed on, the rent was re- " adjusted by mediators. This system gradually developed " into what was practically a fixity of tenure at a low rent, " and the practice sprang up of levying a second year's " rental by way of fine or premium at the end of 12 years. " As long as there was a good feeling between the landlord " and his tenant, there were no disputes. But in process of " time, what with the imposition of a Government tax on " the land, a general advance in the cost of living, and " the assertion by the tenant of greater independence, the " relations of landlord and tenant were changed. The land- " lord was perhaps in difficulties or was avaricious, and he " began to look about for persons who either from motives " of private animosity or simply from land-hunger, were " willing to advance a substantial sum for the privilege of " cultivating the land. Such persons were easily found, and " the old tenant found himself evicted when perhaps he had " only had possession for two or three years from the date " of last renewal. The Courts when called on to decide " between landlord and tenant, at first introduced the rule " that the tenant ought to have the option of making further " advances, and finally settled the matter by holding that " the tenant was entitled to 12 years' quiet enjoyment.

" The effect of the second rule was, in my opinion, to " abrogate the first, which was at the best an illusory " remedy. The landlord might enter a fictitious sum in

"the *Melkanam* deed, which the first tenant must at once "refuse to pay and the first tenant's right was determined.

"When the 12 years' rule became the settled law of "the country, we hear nothing more of the right to make "further advances. Thenceforward the *Kanam* is treated "as a mortgage redeemable after 12 years.

"The case of an *Otti* was different. That was always a "mortgage for a substantial sum, and generally nothing was "left to the mortgagor but the bare equity of redemption.

"If he wished to sell this, he was bound to offer it to "his mortgagee in preference to a stranger. In fact, it was "rather the right of pre-emption than the right to make "further advances which resided in the *Otti* mortgagee.

"If the *Kanam* is to be treated as a usufructuary "mortgage (and after a current of decisions for thirty years, "it is too late to revert to the primitive tenure), it seems to "me that it is in accordance with equitable principles to hold "that the mortgagor may assign his equity of redemption "either absolutely or by creating a second mortgage. No "one in Malabar disputes that he can do the former, and "the greater power seems to me to include the less.

"The *Melkanam* cannot of course take effect so as to "pass possession of the land till the end of the first term.

"Until fixity of tenure is secured by the Legislature to "the first *Kanam* tenant, the rule which the *Kanamkar* "contends for, is practically useless. The *Jenmi* may turn "him out after 12 years and re-grant to another. So that "it really amounts to this.

"Shall the redemption suit be carried on in the name "of the original mortgagor or in the name of the second "mortgagee ?

"My finding on the issue referred is, that by the usage "of Malabar, 1st, 2nd and 3rd defendants were not disen-"titled to grant plaintiff a *Melkanam* without offering 4th

"defendant the option of making further advances in con-"sideration of a renewal."

(9). **Rights of mortgagee:**

The rights of the mortgagee are to assign his term, to foreclose and to claim compensation for unexhausted improvements at the time of redemption.

(a). The right of the *Kanam* tenant to assign absolutely or by sub-mortgage his interest in the land has always been recognized. In the case of an absolute assignment, it is usual for the mortgagee to address an *Enak* or notice to the mortgagor. This is shown to the mortgagor and then retained by the mortgagee, and is sometimes the only evidence of the transfer. In the case of a sub-mortgage, the mortgagee cannot, of course, create a higher title than he possesses, and if holding a *Kanam* he professes to demise on *Kanam,* the sub-mortgagee can only enjoy the remainder of the mortgagee's term. Should the tenure be determined by the original mortgagor, a mortgagee who has assigned his term and subsequently obtains a renewal from his *Jenmi,* does so for the benefit of his sub-mortgagee. Any private arrangement between the original mortgagor and mortgagee during the pendency of the term in fraud of the sub-mortgagee is invalid, more especially, where, as usually happens, the original title deed is in the hands of the sub-mortgagee.

The right to apportion the *Kanam* on various parcels of land is a right which can only be exercised by the mortgagee with the assent of his mortgagor. But if the original mortgagee has taken upon himself to apportion it, the mortgagor may recover the separate parcels on payment of proportionate *Kanam.* A more difficult question is whether, if some of the parcels after assignment to a third party are redeemed on payment of proportionate *Kanam,* the remaining parcels can be redeemed on payment of the balance. If the deed of assignment did not specify what proportion of the *Kanam* was to be reserved on the parcels assigned, I submit that it is open to the Court to take evidence as to

the proportion to be charged on such parcels, and *a fortiori* where a Court attaches and sells in execution of a decree against the mortgagee one out of several parcels held on *Kanam*. There is no direct decision on the point. But in one case Mr. Holloway allowed a *Kanam* tenant to establish his right to one-ninth of the *Kanam* over one out of nine items of land which had been attached (Zillah Dec., January 1856, p. 3.) Mr. Reid appears to have taken a different view in A. S. 198, 216 and 221 of 1876 (S. A. 611 of 1877). I submit that the principle to be followed is that the mortgage *may* be split whenever the conduct of the mortgagee has destroyed the indivisibility of the original contract. (Cf. I. L. R. III. Mad. 230).

(b). Whether a mortgagee could surrender his holding and demand back his money before the expiry of the term was long a matter of doubt. Before the twelve years' rule was firmly established, the Sudr Court held that if the *Kanam* deed contained no limitation to the contrary, the right to demand his money at any time was a right inherent in every mortgagee (Sud. Dec. 1855, p. 109). On the other hand, Mr. Holloway, as Sub-Judge of Calicut, held that as the letting of land on *Kanam* is an implied covenant for 12 years' quiet enjoyment, mutuality required that the money should not be demandable within that period (Zillah Dec., February 1856, p. 3). The same opinion is also expressed in a case decided by the High Court (Frere and Holloway, J. J.) in 1865, though the question did not actually arise. (II. Mad. H. C. Rep. 315).

The purchaser at a Court sale of a mortgagor's equity of redemption is not personally liable for the mortgage debt. He is responsible only to the extent of the mortgagor's interest in the property. (Cf. A. S. 929 of 1881 and 79 of 1882, South Malabar).

Under the new Transfer of Property Bill, a usufructuary mortgagee has no right to a decree for foreclosure, but he can sue for his money and then attach and sell the equity of redemption.

(c). The extent of the mortgagee's right to compensation for unexhausted improvements will be dealt with in Chapter IX.

In A. S. 832 of 1881 (South Malabar) I held that a *Kanamkar* might contract himself out of his common law right to compensation.

(10). Miscellaneous.

The *Kanam* has been treated throughout as a usufructuary mortgage for 12 years. But the parties are at liberty to contract that it shall last for a longer period, and it is not unusual to find a term of 24, 30 or 36 years agreed upon. (Cf. I. L. Rep. II. Mad. 45).

In former times, there was but little distinction between a *Kanam-Pattam* and a *Panayam-Pattam*. Major Walker treats them as synonymous terms. The Sudr Court in describing the land tenures of Malabar in 1856, mention only the *Thotu Panayam* or simple pledge without possession. But there are other tenures known as *Koyu* (ploughshare) *Panayam* or *Kari* (plough) *Panayam* which are pledges with possession. Unless the contract specifies the rights of parties, it is not usual to imply covenants for 12 years' enjoyment or to compensation for improvements in documents of this nature. The *Undaruthi Panayam* is a mortgage which redeems itself within a fixed period, a proportion of the principal being each year liquidated by the surplus usufruct after providing for payment of interest.

It is a common practice in the case of *Kanam* mortgagees that the possession of the land does not pass to the mortgagee. Simultaneously with the *Kanam* deed, a lease agreement is executed by the mortgagor promising to pay the mortgagee a stipulated rent equivalent to the interest on the mortgage. The two agreements are, I submit, invariably intended to be dependent contracts, and the rights of the parties must be ascertained by reference to both. The mortgagee has two remedies. He may sue for possession of the land on the

basis of the lease when the lease is determined, or he may sue for possession of his money after the twelve years have expired. Under the present Limitation Act, XV of 1877, payment of rent under the lease must be regarded as payment of interest on the mortgage and gives a new starting point for limitation.

The above remarks apply only when the *Kanam* deed and lease agreement are contemporaneous. Where the lease agreement was executed three years after the original *Kanam* deed, it was held by the High Court (Turner, C. J., and Kindersley, J.) that the two contracts were independent. (I. L. R. III. Mad. 57).

CHAPTER VIII.

The Otti.

Otti signifies pledge. An *Otti* may be defined as a usufructuary mortgage, the usufruct of which extinguishes the interest, leaving only a nominal rent to be paid to the mortgagor. The same incidents are attached to an *Otti* tenure as to a *Kanam*, and in addition the mortgagee has the right of pre-emption if the mortgagor wishes to dispose of the property.

The 12 years' term does not appear to have been applied to the *Otti* tenure until some time after it was recognized as an ordinary incident of a *Kanam*. In defining an *Otti*, the Sudr Court say:—" Where no period has been stipu-" lated, the landlord may pay off the mortgagee at any " time." (Proceedings of Sudr Court, 5th August 1856).

In A. S. 28 of 1862 (Tellicherry) Mr. Holloway says:—" I give no conclusive opinion as to whether the 12 years' " rule applies to an *Otti*. On principle, it would seem that " it should, for an *Otti* is a *Kanam* and something more, and " it is difficult to see why he who has obtained a larger " right can reasonably be in a worse position than he who " holds a smaller one of the same nature."

In S. A. 380 of 1862, the High Court (Scotland, C. J., and Strange, J.) intimated that the *Otti* mortgagee was entitled to 12 years' quiet enjoyment, but refused to decide the point. (I. Mad. H. C. Rep. 122).

The point was eventually decided by the High Court (Strange and Frere, J. J.) in S. A. 101 of 1862. The Judg-

ment runs:—" We think that an *Otti*, like a *Kanam*, cannot " be redeemed before the lapse of twelve years from the " date of its execution. An *Otti* in fact only differs from a " *Kanam* in two respects. First, in the right of pre-emption " which the *Otti*-holder possesses in case the *Jenmi* wishes " to sell the premises, and secondly, in the amount secured, " which is generally so large as practically to absorb in the " payment of the interest, the rent that would otherwise " have been paid to the *Jenmi*, who is thus entitled to a mere " pepper-corn rent." (I. Mad H. C. Rep. 261).

The *Otti*-holder forfeits his right to hold for 12 years by denying his *Jenmi's* title. (II. Mad. H. C. Rep. 161).

The right of pre-emption was first recognized by Mr. Cook as Sub-Judge of Calicut in 1854 (Zillah Dec. 1854, p. 17) and again by Mr. Holloway in the same Court in 1856 (Zillah Dec. 1856, p. 9). The latter case went on appeal before the Sudr Court in S. A. 30 of 1857 (Sudr Dec. 1857, p. 121) and was followed by a similar decision in 1859. (Sudr Dec. 1859, p. 169).

In A. S. 64 of 1859 (Tellicherry) Mr. Holloway laid down the rule that the *Otti* mortgagee had a right to purchase at a *reasonable* rate.

In a recent case, it was held by the High Court (Turner, C. J., and Forbes, J.) that the *Otti*-holder did not forfeit his right of pre-emption by setting up further charges which he failed to prove, and an Issue was referred for trial whether the appellant had lost his right to pre-emption by failing to assert it, and if he had not so lost it, whether he was ready and willing to exercise it at the time the suit was brought. (I. L. R. III. Mad. 76).

Under the present Limitation Act, it would appear that the *Otti*-holder's right of pre-emption must be exercised within one year from the time that he loses actual possession. (A. S. 987 of 1881, South Malabar).

The right of pre-emption includes the right to make any further advances required by the *Jenmi*, so that the *Jenmi* cannot create a second mortgage without first consulting the first mortgagee. This was expressly decided by the High Court (Scotland, C. J., and Frere, J.) in S. A. 186 of 1862. In this case, both the Lower Courts had held that the right of the *Otti*-holder to make further advances existed only during the pendency of the first term of 12 years, but the High Court say:—

"No authority has been referred to which in any way "countenances this limitation of the right, nor is there any "evidence of a custom or usage to that effect, and in reason "and principle we can see no ground for the distinction." (I. Mad. H. C. Rep. 357).

It is worthy of observation that the limitation sought to be imposed is the exact limitation which Mr. Strange thought was imposed on the right of a *Kanamkar* to make further advances. (See my observations on *Melkanam*, under the head of *Kanam*). A "*Kanam* free from payment of rent" is not equivalent to an *Otti* so as to give a right of pre-emption. This was decided by the High Court (Holloway and Kindersley, J. J.) in S. A. 142 of 1870.

Akin to an *Otti*, but not necessarily carrying with it a right of pre-emption, is the *Peruvartham* mortgage which is peculiar to the Palghaut Taluk of the Malabar District. The peculiarity of this form of mortgage is that in redeeming his property, the mortgagor does not pay the actual sum advanced but the market value at the time of redemption. (I. L. R. I. Mad. 57).

There is no practical distinction between the *Otti Veppu* and *Palishamadaku* deeds. The *Veppu* is in use in the Palghaut Taluk and the *Palishamadaku* in the Nedunganad and Walluvanad Taluks. (Græme's Report, Sec. 1,512).

Between the *Otti* deed and the final sale deed (*Attiper*)

some one or more of four deeds is interposed, termed respectively :—

1. Kaividuga Otti.
2. Ottikumpuram.
3. Nir Mudal or Kudima Nir.
4. Jenm panayam.

Major Walker apparently treats all these deeds as parts of the sale deed. At page 13 of his Report, he says :—"Indeed it may be doubted whether any of those deeds "answer to our ideas of mortgage. They are more properly "deeds of sale with reservation of certain seigniorial rights "to the original proprietor, a mode of disposing of land "highly feudal and still practised in some parts of Europe."

Further, at p. 1, he says :—

"After executing the deed *Kyvidu Otti*, the *Jenmkar* is "not at liberty to revoke it or to demand the *Paramba* back "by returning the money which he received."

On the other hand, in Mr. Thackeray's Report, dated 4th August 1807, the *Kyvidu Otti* is treated as redeemable, and as regards the *Nir Mudal* it is said :—"There appears "to be some difference in different places in the conditions "of the *Nir Mudal*. In some, the option of redemption "seems to reside with the tenant: in some, the original "proprietor still seems to have the option of redeeming the "land on payment of a fine in addition to the debt. (Fifth "Report of Select Committee, II. 442).

In defining the different tenures of Malabar, the Sudr Court treat the *Kaividuga Otti*, the *Ottikumpuram* and *Nir Mudal* as redeemable, and the *Jenm Panayam* as irredeemable. (Proceedings of Sudr Court, dated 5th August 1856).

In an unpublished paper on the Land Tenures of Malabar, Mr. Krishna Menon, the present Sub-Judge of Mangalore, suggests that the word itself *Kaividuga Otti* (lit: that has slipped out of one's hand) indicates that the equity of redemption is lost, but adds that if the mortgagee wishes

to dispose of the estate, he is bound to give the option of purchasing to the *Jenmkar* on repayment of the sum originally advanced by the mortgagee.

Mr. Krishna Menon treats the *Ottikumpuram* as bearing the same relation to an *Otti* as the *Purankadan* to a *Kanam* and the *Jenm Panayam* as equivalent to a *Melkanam*, the *Otti*-holder having refused to advance any further sum. This seems to me to be a happy suggestion.

I had to consider the nature of a *Kaividuga Otti* in A. S. 578 of 1878: 629 of 1878: 198 of 1880: and 967 of 1881 (South Malabar) and on each occasion have held that it is irredeemable. The question is now before the High Court in S. A. 393 of 1882.

In A. S. 629 of 1878, I collected most of the authorities bearing on the subject, and in A. S. 967 of 1881, summed up the matter thus:—" My theory has always been that when " once you enter on one of the four stages preliminary " to the outright sale, the right of redemption is lost. Nor " do I admit that an irredeemable mortgage is equivalent " to an absolute sale. The right of pre-emption, if the mort- " gageewish to part with his interest, is a substantial right. " If a *Jenmi* parts with the visible emblems of *dominium*, " *e. g.*, the right to gather the first fruits, he must be held " to part with the right which those emblems represent, " *i. e.*, the right of redemption."

CHAPTER IX.

The Kurikanam and Improvements.

THE *Kurikanam* or reclaiming lease is the mode by which waste lands are brought under garden cultivation. The cultivator is entitled to enjoy the lands, rent free for twelve years, and at the expiry of that term must surrender to his landlord on receiving full compensation for improvements or enter into new arrangements for future enjoyment. The word *Kurikanam* is also used to signify improvements.

Major Walker treats of this form of lease at p. 16 of his Report under the head of *Arye-kuli-Kanam* and states that the agreement lasts for three years. But it is now the well settled rule that this tenure carries with it the right to hold for twelve years. The tenure is thus described in an extract from the General Report of the Board of Revenue, dated 31st January 1803 :—" *Cuy-Kanam patum*, tenure by " labour—usufructuary tenure ; by which the Jemmumkar " gives a spot of land to a person who undertakes to fence " and plant it with productive trees for which he is ensured " in the possession of it for a specified period (12 years) free " from all charges. The trees do not generally produce for " the first six years, but the Cuy-Kanamkar has five or six " years' enjoyment of the ground in a productive state. At " the expiration of the lease, the Jemmumkar has the right " of resumption on paying the rents for the buildings and " wells according to appraisement and for the plantation " at fixed rates. The resumption of this tenure is seldom

"enforced, but the Cuy-Kanamkar enjoys the lease at an "easy rent till reimbursed. This tenure can be transferred "or mortgaged: the soil to one, the buildings to another, "which tends to the deterioration of the estate." (Fifth Report of Select Committee, p. 440).

In defining a *Kurikanam,* the Sudr Court say:—

"Where no express period has been stipulated, this "lease is considered to run for 12 years, otherwise, for such "period as may have been agreed upon. At the expiration "of either of these periods, the landlord may either renew "the lease to the same tenant paying him the value of his "improvements, which may also be invested as a mortgage, "or he may satisfy all the tenant's claim upon the land for "improvements and may let the property to a new tenant. "Compensation is allowed for buildings and fruit-producing "trees and shrubs of every description. In the event of "a tenant failing to reclaim the land, plant trees and other-"wise fulfil the conditions of the deed, he may be dispos-"sessed by the landlord before the expiration of the period "specified. The landlord may exercise a similar power in "the event of the tenant setting up a fraudulent title to "the land." (Proceedings of Sudr Court, 5th August 1856).

In A. S. 327 of 1872 (Tellicherry) the Sub-Judge Mr. Krishna Menon, thus describes the tenant's right to improvements:—"The Malabar law secures to the tenant "the right of being paid for all kinds of improvements "irrespective of the period during which he remains in "possession of the land into which he has introduced such "improvements. Under this law, there are three kinds of "improvements for which a tenant is entitled to compensa-"tion. The first is *Kuyikur* which includes all fruit-bearing "trees, shrubs and vines; the second *Chamayam,* which com-"prises all sorts of buildings, such as houses, cow stalls, "tanks, wells, granaries, walls, &c., and the third *Vettu-"kanam,* which includes every act which is calculated to "improve the soil of the land, such as clearing of waste,

"manuring, &c. The law encourages cultivation to such "an extent as to entitle even a trespasser to the value "of improvements, subjecting him only to a deduction of "one-tenth upon the value of improvements."

The three classes of improvements correspond approximately to the threefold division of Plantations, Fixtures and Tillages known to the English Common law.

In connection with the remark that even a trespasser is entitled to the value of improvements, it will not be irrelevant to give a short description of the Government system of granting Cowles for reclaiming waste lands. Any person is at liberty to apply to the Government for permission to occupy waste land. But the Cowle merely confers a right to hold the land free from the payment of Government tax for a term of years. It confers no title as against the *Jenmi* of the land who is at liberty to eject the Cowle holder or squatter on payment of the value of improvements effected by him. After 12 years, the squatter will acquire a good title by occupation against the *Jenmi*. (See printed papers in S. A. 617 of 1878 and 181 of 1880, where the matter is discussed). According to Major Walker, it was formerly the practice, except in the case of *Otti* and superior tenures, to insert the words *Kurikanam* (which covers villages and plantations) and *Kudi-irippu* (which covers fixtures) in the contract between the parties, and unless these words were inserted, no compensation could be claimed.

It is now, however, the practice of the Courts to hold that in a *Kurikanam* (reclaiming lease) or an ordinary *Kanam* or any superior tenure, there is an implied covenant to compensate for all unexhausted improvements. This change was probably introduced when the Courts began to recognize a twelve years' term.

In A. S. 3 of 1843 (Tellicherry) Mr. Strange held that the holder of a *Kurikanam* lease forfeited his right to hold

for 12 years by neglecting to plant trees in accordance with the terms of his contract.

In A. S. 55 of 1843 (Tellicherry) Mr. Waters held that in the grant of a *Kurikanam* lease, there was an implied consent on the part of the *Jenmi* to the tenant's building a suitable house on the demised premises and a corresponding obligation to pay compensation. This decision was confirmed by the Sudr Court in S. A. 11 of 1847. (Sud. Dec. 1849, p. 62).

The farm buildings erected by the tenant must be of a suitable character to the holding.

In A. S. 156 and 161 of 1877 (South Malabar) the question arose whether a *Jenmi* was at liberty to relinquish a portion of the demised property on which an expensive house had been built, and I held that if not suitable to the holding and unreasonable, it might be excluded.

The more common mode is for the *Jenmi* to ask that the buildings erected may be removed by the tenant. On the one hand, it is hard on the tenant to be left with a farm house and buildings in the centre of paddy fields and cocoanut plantations in which he has no interest. On the other hand, it is hard on the landlord to be improved out of his own land. It is the duty of the Courts to check capricious conduct on the part of either.

In the case of a tenant whose demise has been renewed from time to time, the question frequently arises whether he is entitled to compensation for improvements made from his first entry or only from the date of the last renewal. Before the introduction of the twelve years' term, the custom was, when a renewal took place, to assess the improvements and add them to the *Kanam* amount. If this was not done, it was usually recited in the new deed that the right to improvements was reserved. When the deed of renewal was silent on the subject of the adjustment of the tenant's claim, Mr. Holloway, as Sub-Judge of Calicut, held

that as there was a new contract, the presumption was that the tenant's claim was satisfied.

"The renewal of a deed is not a continuation of an old " contract but the making of a new one, and it must be " concluded that all rights accruing to the tenant under " the former contract were then disposed of: otherwise, there " could be no termination to suits of this nature. Reason, " convenience and the principle of the law which forbids " the varying of a contract reduced to writing by evidence " of extrinsic matter, all point to the date of renewal as that " from which improvements to be paid for on return are " calculated. That is in fact, so far as a Court can appre- " ciate it, the commencement of the tenancy." (Zillah Dec., Calicut Sub-Court, October 1856, p. 2).

On the other hand, the Sub-Judge of Tellicherry, Mr. Krishna Menon, appears to have been of opinion that the presumption was that the tenant's claim was not satisfied.

The matter has lately been before the High Court in S. A. 642 and 643 of 1880. The Judges (Innes and Muttusami Aiyar) declined to follow Mr. Holloway's reasoning and referred an issue to me for trial as to the custom. I found that there was no fixed rule on the subject, but pointed out that if in the renewal deed fixtures were spoken of as the property of the *Jenmi*, or if what was formerly a *Paramba* had been converted into a *Palliyal* and was so mentioned in the renewal deed, the tenant could not reasonably claim compensation in the one case for the structure or in the other case for the cost of conversion. The High Court in their Proceedings of 22nd December 1881 admitted that such facts would raise a strong presumption against the tenant but not an irrebuttable presumption. (I. L. R. IV. Mad., 287).

As to the rates payable for improvements, it is usual to depute a Commissioner to assess the improvements according to the customary rates of the locality. So far back as 1854, it was suggested by Mr. Strange in his Report

on the Mopla outrages, that the revision of the rules which regulate the rates of reimbursement for improvements effected by tenants was desirable, and that the rate should be according to the actual value of the products planted by the tenants and not the nominal value fixed by usage, which is far below the actual value. But the Sudr Court advised the Government that it was a subject on which legislative interference was inexpedient. (Sudr Proceedings, 13th February 1854).

The rates for fixtures and tillages do not vary to any considerable extent throughout the District. In assessing the former, it is usual to calculate the cost of the stones, timber and other materials used and of the labor employed, and allow a percentage for depreciation. In assessing the tillages, it is usual to calculate from 3 to 6 pice per kandy or cubic *Kôl* according to the nature of the soil.

In the case of plantations, the customary rates exhibit marked variations. In the northern part of Malabar and in the Calicut taluk of South Malabar, the highest rate for a cocoanut tree in full bearing is only 8 Annas. On the other hand in Chowghat, to the extreme south of South Malabar, the rate is as high as 8 Rupees. In other parts of South Malabar the rate varies, but the average rate is from 4 to 5 Rupees.

In 1878, I obtained official reports from all the Munsifs of South Malabar as to the customary rates prevailing in all the villages in their jurisdiction, and it is usual to adopt these rates as the standard of valuation.

In S. A. 30 of 1881, the Appellant took objection to the customary deduction of the *Jenmi's* half share as a hardship, but without success.

It is impossible satisfactorily to account for the variations in rates. Sometimes there is a special rate for each Amshom or parish. Sometimes the trees are valued at their full market value and a fixed per centage, one-half or one-

third, is deducted as the *Jenmi's* share. A partial explanation may be discovered in the difference between the *Kanam* of North Malabar and the *Kanam* of South Malabar, which I have alluded to in my preliminary observations on the *Kanam*. It may well be that, in the former case, the land was regarded as the property of the aristocracy and leased out to tenants, and that in the latter, the land was originally the property of the tenant who converted his rent service into a rent charge. In Chowghat, most of the lands were taken up on reclaiming leases after the landlord and tenant system had been firmly established. Possibly the rates have sometimes varied according as the local judge was an advocate of landlord or tenant right.

It is usual to classify the trees according to their productive powers and their age, and even for tender plants which have not arrived at the fruit-bearing stage, some allowance is made.

Without introducing a measure of confiscation, Legislation can do nothing in the way of assimilating the rates in various parts of the District for improvements already made. But for the future, the right of the tenant to the full market value of improvements effected by him, less perhaps a certain deduction for the unearned increment, might fairly be recognized and would tend to improve the agriculture of the Province. Perhaps a more feasible method would be to introduce a legislative enactment conferring fixity of tenure on the tenant under certain conditions.

The compensation payable under a decree is usually apportioned among those in actual possession of the demised parcels. In A. S. 144 of 1855, Mr. Holloway, speaking of the *Kanam* and improvements, says :—" Such as are assess-" able upon portions of land transferred to others by the " *Kanamkar* on account of money borrowed, will be payable " for the sake of convenience to those who are at the time " of execution of the decree in manual possession of the " land." (Zillah Dec., Calicut Sub-Court, June 1857, p. 32).

The right of simple tenants of the *Kanamkar* to improvements effected by them is also recognized when there is no dispute as to the fact. (Zillah Dec., Calicut Sub-Court, 1854, p. 4). And in one case before me, the hired labourers of the *Kanamkar* were held entitled to the value of their huts and plantain gardens.

Until recently, it was usual to reserve for execution the valuation of improvements, and the reason for so doing was that when once the improvements were assessed, the tenant was in the habit of destroying them to the injury of his *Jenmi*. Now, however, the High Court insist on the value of improvements being ascertained before decree (High Court's letter dated 14th July 1880, No. 973). If there has been any material change in the value of improvements between the decree and the application for execution, there seems nothing to prevent a re-valuation. The decree provides that premises with certain improvements on them should be surrendered on payment of a certain sum. If the improvements are no longer there, there should be a corresponding deduction in the sum paid, and this is, I submit, a question arising between the parties to the suit and relating to the execution of the decree within the meaning of Sec. 244 of the Civil Procedure Code.

In S. A. 91 of 1881, the defendant had purchased the *Kanam* right over a tract of hilly country where there were a number of squatters who had opened Coffee estates. Plaintiff bought out these squatters and spent a considerable sum of money in improving the Coffee estate. Defendant dispossessed him. Plaintiff sued to recover possession on the basis of a title acquired from the *Jenmi* and also as purchaser of the squatters' rights. The title was found against him, but it was held that, according to the custom of the country, he was entitled to be paid compensation before eviction, and that he might recover such compensation as damages.

CHAPTER X.

Perpetual Leases.

Grants of land *pro servitiis impensis vel impendendis, i. e.,* for past or future services, were usually in the form of perpetual leases.

I have already in my introductory chapter on Land Tenures, noticed the different names applied to such grants. As regards *Anubhavam* grants, I may refer to the records of S. A. 595 of 1878 and S. A. 569 of 1879. The ancient opinion seems to have been that such grants of land were resumable by the grantor on failure of heirs in the grantee's family, and were inalienable except with the consent of the grantor. The terms of *Adima, Kudima, Anubhavam, Karankari* or *Jenmkoru* and *Karaima* are defined by the Sudr Court in their Proceedings of 5th August 1856. All the tenures are said to be inalienable but resumable by the grantor on failure of heirs in the grantee's family.

There is a singular absence of judicial authority in respect of these grants, and it is doubtful how far in the present day the Courts would recognize the grantor's power of resumption. At all events, the grantor's representative would be required to prove clearly that the grant was inalienable and resumable, and if the land had passed to *bonâ fide* purchasers, they would probably be protected.

The Privy Council appear to have decided that the non-performance of services, which in course of time had become unnecessary, was no ground for resuming a grant of land burdened with a certain service (XIII Moore, 438, and L. R. Suppt. Vol., 181) and in S. A. 243 of 1877, the High Court

seem to have been of opinion that the non-performance of certain feudal services, the necessity for which had ceased to exist, would not forfeit the tenure.

In A. S. 704 of 1881 (South Malabar) the Kongat Nayar claimed the reversion of an estate belonging to Narikat Mutha Nayar, whose family had become extinct, on the ground that the estate was originally granted in consideration of some services to be performed at the death of each Kongat Valiya Nayar. I held that in the absence of distinct evidence as to the terms of the grant, it could only be treated as an ordinary Enam holding which would escheat to Government in the absence of heirs.

As regards temple lands held on service tenure (*Karaima*) it seems to be settled that such tenures cannot be capriciously determined so long as the grantee is ready and willing to perform the service. (See printed papers in S. A. 254 of 1880 and 471 of 1880).

In a recent case, I held that such lands are inseparable from the service, and on failure of heirs in the grantee's family, are resumable by the grantor. My decision was affirmed by the High Court S. A. 850 of 1881.

PART III.

MISCELLANEOUS.

CHAPTER XI.—LOTTERIES.

CHAPTER XII.—MOPLAS.

CHAPTER XIII.—PYMASH ACCOUNTS.

CHAPTER XIV.—STANAMS.

CHAPTER XV.—TEMPLES.

CHAPTER XI.

Lotteries.

The system of lotteries, though not peculiar to Malabar, is more prevalent here than elsewhere. It is thus described by Mr. Græme in or about 1822 :—

" *Changati-kuri.* A lodge or meeting of friends. It " was formerly very common in Malabar among the natives " and is still partially kept up for the purpose of discuss-" ing any particular subject or of enquiring into the con-" duct of any individual. It is not confined to people of the " same caste, but may be composed of Nayars, Tiers and " Moplas. Besides promoting social intercourse, it has a " tendency to prudential consequences. It induces eco-" nomy.

* * * *

" It is supported by the subscription of the members " in the following manner. Suppose there are 25 members, " that each contributes four fanams monthly, making a " total stock for each month of 100 fanams, that the society " is limited to twenty-five months' duration, and every " member is obliged to give an entertainment to the party " once in the course of this period at his own house. It " does not come to the members in regular turn, but is " decided by lot, that is, every member places with his " subscription a ticket with his name in the deposit and a " ticket is drawn every month by some indifferent persons, " and the person whose name appears in the ticket drawn " gives the entertainment and is entitled to the amount in " deposit in the month. The entertainment is calculated to " cost at most not more than 10 per cent. of one month's

" subscription of all the members, and the great advantage " is derived from drawing a ticket at an early stage on " account of the interest upon the sum for the remaining " period. There is no other prize. Every member's sub- " scription amounts in the end to the whole principal gain " which he can ever make. The greatest disadvantage to " any member is the drawing his ticket towards the close " of the duration of the society, the consequent loss of " interest on his monthly subscription and the loss of prin- " cipal expended in the entertainment, to the extent of two " and a half months' subscription.

" But these are counterbalanced by the facility of " procuring easy loans of money upon the security which " the ultimate certainty of attaining a prize affords. The " monthly subscriptions in the meantime are small and are " not felt and induce a habit of saving which would not " otherwise be practised.

" *Kuri-Muppan* is the president of the society termed " *Changati-kuri* whose duty it is to see the money collected, " or on failure to forfeit to the prize-drawer double the " deficient subscription. He is entitled to the privilege of " giving the first month's entertainment. The society has " of late years fallen into disuse, partly because the Euro- " pean authorities have discouraged it among all public " servants as liable to abuses, and partly because it does " not enjoy the necessary power to enforce its rules by " degradation or other punishment, and members are not " to be found who will support it from their own respecta- " bility. The contempt of its regulations can only be " attempted to be remedied by a tedious, vexatious and " expensive appeal to judicial tribunal, an appeal likely to " be more particularly ineffectual from the compact of the " parties being rather understood than expressed, and " founded more upon a sense of honor than upon law or " written agreement."

That is a fair description of the lotteries of the present day, with this exception, that the custom of the prize-holder

giving a social entertainment has fallen into disuse and that the society is now a Provident Club conducted on business principles. It is usual for the prize-holder to execute an instalment bond for the amount of his future subscriptions in favor of the *Kuri-Muppan* which contains the usual clause for enforcing the whole sum if one instalment is not paid. From the number of suits which come into Court, it would seem that many of these lotteries are got up by needy adventurers.

After the passing of Act V of 1844, it was held that these lotteries were illegal. (Zillah Dec., Calicut Sub-Court, December 1855, p. 9, and August 1856, p. 23). But the Sudr Court, Messrs. Hooper, Strange and Baynes, J. J.) took a different view. In their Judgment in S. A. 169 of 1857, they say:—

" The Judges are clearly of opinion that such a trans-" action as the parties describe in the original pleadings in " no way contravenes Act V of 1844. It has in it no ele-" ment of chance or risk; the money paid by each subscriber " being eventually returned to him. It is a provident and " beneficial arrangement under which each party derives " the benefit of having the use in his turn of a round sum; " the only thing determined by lot is the turn in which that " advantage shall be enjoyed—a circumstance which does " not, in the opinion of the Judges, bring it within the scope " of Act V of 1844." (Sudr Dec., 1858, p. 54).

In Ref. Case 19 of 1863, the High Court (Scotland, C. J., and Frere, J.) endorsed this view. (I. Mad. H. C. 448).

Closely akin to the *Kûri* is the *Kûri-kaliyanam* which is thus described by Mr. Græme:—

" It is an entertainment given by a respectable native, " at which all his friends who are invited present a certain " sum of money and a certain number of cocoanuts, plan-" tains, betel leaves and betel nuts, every man according to " his fancy, to the entertainer. The host feeds all those " who come and has diversions for the company. An

" account is kept of what each guest offers, and when these " guests in their turn announce that an entertainment is to " be given by them, the person who has formerly had the " benefit of an entertainment is expected to be present and " to make a return at least equal, but in general half as " much again and sometimes double what he has received.

" To any person who evades the invitation and does " not send the proper present of money and fruit, a small " vessel of arrack and the bone of a fowl are sent in deri- " sion to shame him into a more liberal spirit, and he is " desired to eat and drink them and to return the money " he formerly received. This in general was sufficient to " ensure a compliance with the custom."

The question has arisen whether there is any legal obligation on the part of the host to return the money presented to him when he is invited in his turn by his *quondam* guest.

In A. S. 640 of 1880 (South Malabar) I held that the obligation was moral only and was not enforceable at law.

There is a similar decision by Mr. Holloway as Sub-Judge of Calicut. (Zillah Dec., Calicut Sub-Court, January 1857, p. 12).

CHAPTER XII.

Moplas.

THE Moplas of North Malabar follow the *Marumakkatayam* system of inheritance, whilst the Moplas of South Malabar, with some few exceptions, follow the ordinary Mahomedan Law. Among those who profess to follow the *Marumakkatayam* Law, the practice frequently prevails of treating the self-acquisitions of a man as descendible to his wife and children under the Mahomedan Law. Among those who follow the ordinary Mahomedan Law, it is not unusual for a father and sons to have community of property and for the property to be managed by the father and, after his death, by the eldest son.

(1) The Moplas of North Malabar follow the Marumakkatayam system of inheritance.

The Sudr Court, in S. A. 5 of 1809, at first refused to recognize the local usage among Moplas of North Malabar (I. Sud. Dec., p. 29). But in A. S. 44 of 1816, the Provincial Court of the Western Division held that the *Marumakkatayam* Law of inheritance was applicable generally to Mopla families in Cannanore. This rule was subsequently followed, and it was held that a Mopla of North Malabar had no power to make a will. (Cf. S. A. 125 of 1855: S. A. 265 of 1860 and S. A. 651 of 1860).

In A. S. 485 of 1875 (South Malabar) the question

arose whether the family was governed by the *Marnmakkatayam* Law or the Mahomedan Law. I found that the property was originally settled on the females and was intended to be impartible and to descend in the female line, but that the intention of excluding the descendants of males had not been consistently carried out. On these facts, the High Court decided in S. A. 429 of 1876 that the case must be governed by the Mahomedan Law.

(2). Among those who profess to follow the Marumakkatayam Law, the practice frequently prevails of treating the self-acquisitions of a man as descendible to his wife and children under Mahomedan Law.

The first case in which this custom was set up in the Courts was A. S. 124 of 1851 (Tellicherry). Mr. Frere, the Civil Judge, observes :—

" Whether such a mixed rule of inheritance which is " neither in accordance with the usual custom of Malabar " in regard to other castes nor to the ordinary Hindu Law " could be held to have the force of law in families of the " above description, it is not necessary to enquire in the " absence of any satisfactory proof that the property derived " by the Respondents was acquired by their father Soopi." (Zillah Dec., Tellicherry Civil Court, December 1851, p. 9).

In admitting S. A. 269 of 1855, the Sudr Court questioned the propriety of two distinct laws of inheritance prevailing in the same family. And in A. S. 116 of 1861 (Tellicherry) Mr. Holloway decided against the validity of what he termed " a piebald system of descent." The custom appears to have been set up in a case which went before the Privy Council and which is reported at II. Suth., P. C., 418. But it was found that the custom was not sufficiently established.

That the custom exists notwithstanding the attempts of the Courts to stifle it seems to me undoubted. It is in full force in the Laccadive Islands and the records of S. A. 689 and 713 of 1880, now pending before the High Court,

show that the contending parties admitted the custom to be in force.

The difficulties of administering a double law of inheritance are great, but it seems to me that if called on, the Courts are bound to decide which property is ancestral and which self-acquired, and, if the custom is proved that the nephews inherit one and the children the other, to give effect to that custom. If the custom is proved, the burden of proving what portion of the property was self-acquired will rest on the children, and it will not suffice to show that it was acquired by their father. They will have further to show that it was acquired by private funds at his absolute disposal and not by funds belonging to the *Tarwad* of which he was the manager.

A curious question arose recently in S. A. 818 of 1880. A woman belonging to a family governed by the *Marumakkatayam* Law had married a man belonging to a family governed by Mahomedan Law and after the wife's death, the husband claimed to retain the property given to his wife on the occasion of her marriage by her *Tarwad.*

The High Court (Turner, C. J., and Muttusami Aiyar, J.) directed issues to be tried whether the property was given on the understanding that it should revert to the *Tarwad* and, if it was given absolutely, whether there was any special custom governing the succession. The Lower Appellate Court found that it was given on the understanding that it should revert to the *Tarwad* and it therefore became unnecessary to decide the second issue. If it had been found that the property was the self-acquisition of the wife, its devolution would, I apprehend, under the circumstances, have been governed by Mahomedan Law.

(3). Among those who follow the ordinary Mahomedan Law, it is not unusual for a father and sons to have community of property and for the property to be managed by the father and after his death by the eldest son.

This custom is not peculiar to Malabar and it is always

a difficult question to what extent the presumptions of Hindu Law are applicable to Mahomedan families living in co-parcenary. Under the Statute of Limitations, suits for the share of an intestate property must be brought within twelve years from the date when the estate falls into possession, that is, from the death of the father. But it is open to the wife and children by a voluntary agreement to postpone partition of their separate shares and, in such a case, it would probably be held that the eldest son as managing member of the family was trustee for the other sharers. But suppose more than twelve years have elapsed from the father's death and one of the sharers has died without reducing his or her share to possession, does the right to enforce partition survive to the legal heirs of such sharer? Such questions not unfrequently arise in the Malabar Courts, but I am not aware of any ruling of a superior Court on the question.

In the cases which have come before me personally, I have held that unless there has been some recognition of the grandson's right to enforce partition of his father's or mother's share, a suit will be barred after 12 years from the grand-father's death. Again in suits by a daughter for her share of her father's property, I have held that she is bound to bring into account the property given to her by her parents at the time of her marriage, which is known by the name of *Stridhanam* or *Kai-panam*. The practice of purchasing land in the name of a wife or daughter *benami* for the family exists to so great an extent that it is most unsafe to hold that property invested and registered in the name of an individual female is really her separate property.

In the case of a Mahomedan family living in co-parcenary, difficult questions also arise as to the extent to which the Manager has implied authority to pledge the credit of the family. The managing member may bind the other members within the scope of his authority, and there can, I apprehend, be no doubt that the generally received opinion

is that, in Malabar, the power of a Mahomedan manager more nearly resembles the power of a *Karnavan* of a Malabar *Tarwad* than the power of the managing member of an ordinary Hindu undivided family. Where a decree is obtained against the manager and is afterwards executed against the family, it will always be a question of fact whether the interest sold was that of the individual judgment-debtor or of the family. After the death of a Mahomedan father, a decree against a majority of his heirs will, I submit, bind the family in the absence of fraud or collusion.

CHAPTER XIII.

Pymash Accounts.

IN a recent case decided by the Privy Council (I. L. R. III. Mad. 392) the Lower Courts made use of the Pymash accounts produced in evidence to determine the issue of fact whether the lands in suit were the Rajah's Stanam lands or Devasam lands. The Judgment of the Privy Council contains the following observations on the value of Pymash accounts as evidence:—

"On looking at these accounts, two observations at "once occur. The first is that putting them at the highest, "they are only evidence of possession, having been render- "ed to Government for the purpose of informing them from "whom they were to demand the revenue. The second is "that they can hardly be said to be public documents at "all, for, on the face of them, it is stated that they were "never confirmed and never acted on. The person who "made these returns may have believed that the lands "were Devasam property, but his statement to that effect is "a mere private opinion, unless and until it is affirmed or "acted on in some public way. It is remarkable that in the "suit of 1833, a copy of one of these accounts was refused "to one of the litigant parties, on the very ground that the "account had never been confirmed, and was only granted "on its being discovered that a copy had already been given "to his opponent. These documents should not have been "treated as evidence."

In S. A. 770 of 1881, the High Court (Turner, C. J., and Muttusami Aiyar, J.) in remanding A. S. 388 of 1881 to me

for re-hearing, say:—"The Court of first instance appears "to have attached undue weight to the effect of certain "Pymash accounts as evidence of title," and referred me to the observations of the Privy Council quoted above.

When A. S. 388 of 1881 came on for re-hearing, I took occasion to go into the history of Pymash accounts in Malabar, and as my Judgment contains a short resumé of the matter, I feel no hesitation in printing the following extract from it.

"Before proceeding to dispose of the Appeal, it seems "necessary that I should say a few words as to the weight "to be attached to Pymash accounts in general, as I am "convinced that some misapprehension on the subject exists "both in the Privy Council and in the High Court.

* * *

"I believe that I shall be able to show that the Privy "Council have altogether underrated the value of Pymash "accounts in Malabar.

"There are four sets of accounts in the Collector's "Office which are ordinarily known by the name of Pymash "accounts, although, strictly speaking, only the accounts of "1805 to 1810 (Warden's Alavu Pymash) have any pretensions to the name of Pymash, that is, Survey accounts. "The circumstances in which the various accounts were "prepared is succinctly set forth in the Proceedings of the "Board of Revenue, dated 23rd December 1857, No. 4,689, "as follows:—

"'In this communication, the Acting Collector gives an elabo- "'rate account of the various plans that have been adopted from "'time to time to obtain correct returns of the number of lands, "'gardens, &c., in the Malabar District, and of the causes of failure "'of the different attempts to supply the want of reliable and "'systematically prepared Revenue accounts, which has been felt "'from the commencement of our rule, particularly on the failure "'of the quinquennial settlement in 1795-96, and the introduction "'of a Ryotwary administration.

"'In 1798-99, Mr. Smee, the Principal Collector, made the first

"'attempt, after the assumption of the Province, to carry out a Re-
"'venue Survey of the southern central divisions. It does not
"'appear what plan was adopted, but the scheme was soon abandon-
"'ed in consequence of the corruption of the Canargoes who were
"'appointed to inspect the lands. The Returns then prepared were
"'never acted on.

"'Between the years 1805 and 1810, Mr. Warden undertook
"'the survey of the lands and gardens of the whole District. The
"'plan adopted by Mr. Warden was to call on each revenue payer to
"'send in a detailed return of his landed properties and holdings of
"'every description assessible to the revenue, showing the parti-
"'culars of seed sown, extent, rental and number of trees. The
"'Returns then prepared are called the Jema Pymash of 1805-6.
"'Subsequently, a survey of the rice lands by measurers summoned
"'from Coimbatore was completed, and is now known as the Alavu
"'Pymash of 1806-10. Though this survey was a failure and never
"'acted upon, the accounts under both denominations, the Acting
"'Collector states, are, notwithstanding great inaccuracies, the most
"'valuable record extant in the District. The cost of these surveys
"'cannot be ascertained, but as they extended over 6 or 7 years, it
"'is supposed the charges were considerable.

"'The next attempt to survey the lands and gardens of the
"'District was made by Mr. Commissioner Græme in 1820-23. He
"'condemned Mr. Warden's surveys and showed that a large loss
"'of revenue would result from acting on them. Mr. Græme com-
"'menced operations by dismissing or remodelling the entire Vil-
"'lage Establishment and by appointing a new class of Deshadhi-
"'garies or Potails of his own selection. On these he proposed to
"'confer hereditary sunnuds as an inducement to be honest, but the
"'Honourable Court disapproved of the measure. Mr. Græme left
"'the District in 1823, and Mr. Vaughan continued the survey. But
"'after two years' trial this scheme, like the others, failed through
"'the corruption of the parties appointed to carry it out, and from
"'the proprietors an d ryots giving false Returns of the holding, &c.

"'The last effort to obtain reliable Revenue accounts was com-
"'menced in 1833 under Mr. Clementson, and is the one regarding
"'which the Government have called for further information. The
"'plan adopted was to require the Deshadhigaries to make Returns
"'of all rice and garden lands, &c., within the Amshoms, and to
"'inspect the documents and to collate the Deshadhigaries' Pymash
"'accounts of 1820-25. The Tahsildars were directed to check
"'and supervise the preparation of these lists and transmit the
"'Returns to the Huzur, there to be drawn up as Koolwar Chittahs.

" 'In consequence of the backwardness and incompetency of " 'the Village Officers, a sufficient number of the Returns known as " '*Poogil Vivaram* (or description of crops) was not received in the " 'Huzur till 1843 to make it worth while to commence operations. " 'In that year, an extra establishment was sanctioned for the pur- " 'pose, and about one-half of the Returns prepared by the Desha- " 'dhigaries were copied into the form of Koolwar Chittahs, but " 'the worthlessness of the Returns from which they were framed " 'was discovered on the first attempt to verify the accounts, and " 'the work was therefore suspended and further expenditure on " 'that account avoided.' "

" We may conveniently refer to the accounts as

" Smee's Pymash of	...	1798-99
" Warden's Pymash of	...	1805-10
" Græme's Pymash of	...	1820-25
" Clementson's Pukilvivaram of		1833-43

" We have very little evidence as to the basis of Smee's " Pymash, and it was probably compiled entirely by Village " Officers, many of whom were corrupt.

" Warden's Pymash was compiled on information given " by the Revenue tax-payer, and the measurements were " made by officers from Coimbatore, who were perhaps a " little less corrupt than the Malabar Village Officers.

" The value of Græme's Pymash in a Court of Justice " consists in a fact, which is not noticed by the Board of " Revenue, that the tenants were all called upon to deposit " copies of their title deeds in the Collector's office. Cle- " mentson's Pukilvivaram was really little more than a rec- " tification of Græme's Pymash.

" Now it is obvious that although the accounts as to " measurements may be wholly unreliable and valueless for " revenue purposes, the entries of the names of the *Jenmis* " and the actual cultivator may be of the highest value, " not only as a record of private rights but as admissions. " The reason why the Government append a Certificate to " copies of Pymash accounts granted by them that they

" were not confirmed and not acted on, is lest they should " hereafter be prejudiced in dealing with escheat lands. All " that the Certificate imports is that the Government decline " to be responsible for the accuracy of the entries. At the " time of Warden's Pymash, the Revenue tax-payer was for " the most part the *Jenmi*, and information obtained from " the *Jenmis* as to the name of their tenant may be relied " on. Similarly, Græme's Pymash was compiled on information received from the tenant and often amounts to a " valuable admission, more especially when, as frequently " happens, a copy of the demise deposited with the Collector under the signature of the demisee is produced. These " have been frequently held to constitute acknowledgments " within the meaning of section 19 of the Limitation Act. " When all the Pymash accounts of the various years agree " as to the name of the *Jenmi* and tenant and of the land, " they are very strong corroborative evidence of title. Even " when they differ, by a careful discrimination, they are " valuable either for the purpose of confirming or contradicting the other evidence as to title. I should regret " very much to see Pymash accounts discarded as evidence " of title."

CHAPTER XIV.

Stanams.

THE word *Stanam* means a dignity and primarily denotes the *status* of the senior Rajahs in the Malabar *Kovilagams* or Palaces. Their position is also called *Kur Vaycha.* The theory is that when a Rajah attains to the rank of first, second, third, fourth, &c., in the family, he resigns his place in the *Kovilagam* or Palace in which he was brought up and lives apart on the property set apart for his *Stanam* or dignity.

The creation of a *Stanam* with property appurtenant thereto, indicates a somewhat advanced stage of civilization when joint ownership was developing into individual ownership. Probably the first step was the division of *Kovilagam* property into *Anvayi* and *Penvayi*, *i. e.*, male and female properties, the former being under the management of the senior Rajah, and the latter under the management of the senior female in the *Kovilagam.* The next step was the separation of certain portions of the common property for the individual enjoyment of the senior Rajahs, the other members of the family, male and female, being supported by the *Kovilagam* in which they were born. The *Kovilagam* was managed in two instances (Calicut and Walluvanad) by the senior female or Tambiratti, and in other Royal families by

the senior male who had not attained to the rank of senior Rajah. Although the rule is that one who attains to a *Stanam* ceases to have any interest in his *Kovilagam*, the practice is not always in conformity with the rule, and a Rajah who has attained to a *Stanam* frequently exercises an all-powerful influence in the family councils with regard to the management of the *Kovilagam* property.

Accumulations made by a *Stani* are at his absolute disposal, but if undisposed of in his lifetime, pass to the *Kovilagam* or family in which he was born. *Stanam* property is inalienable except in cases of the gravest necessity and for the benefit of the *Stanam*. The burden of proof lies on the alienee. The *Stani* has a life estate and can create subordinate tenures in accordance with custom, but cannot alienate the *corpus* to the prejudice of his successor.

As regards debts contracted by a *Stani*, his position is essentially different from that of a *Karnavan* of a Malabar *Tarwad*. The *Karnavan* is the accredited agent of the family, and a creditor dealing with him gives credit not to the individual but to the family in all matters apparently and ordinarily within the scope of a *Karnavan's* authority. On the other hand, a creditor dealing with a *Stani* gives a personal credit only. It requires strict proof on his part of imminent pressure arising from circumstances over which the *Stani* had no control to justify a secured debt being fastened on *Stanam* property. The creditor is of course entitled to follow his debtor's assets in the hands of his heirs,

but the succeeding *Stani* can in no circumstances be personally liable for the debts of his predecessor.

Many Nayar families of respectability have adopted the customs of the Rajahs and created *Stanams* to be filled by the senior member of one house or of several houses connected with one another by community of pollution. But the Courts have discouraged such attempts.

In its wider sense, with which we are not concerned, the word *Stanam* has acquired the same meaning as *Mirasi* on the Eastern Coast, and is used to denote the position of some religious functionary, hereditary officer of State, &c., who by virtue of his office enjoys land rent free.

I propose to review the decisions under three heads :—

(1). Constitution of Stanams.

(2). Alienation by Stanis.

(3). Debts contracted by Stanis.

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(1). Constitution of Stanams.

The constitution of the *Kovilagams* and the right of succession by seniority to the dignity of Rajah is described by the Joint Commissioners of Malabar in their Report dated 11th October 1793, paras. 11 and 90.

A description of the Palghaut family is given in Mr. Warden's Report to the Board of Revenue, dated 19th March 1801:—" It originally consisted of eight Edoms or " houses equally divided from each other by the appellation " of the Northern and Southern branch. The members of " these Edoms are called Atchimars, five of whom, the eldest " in age, bear the title of Rajahs under the denomination of " the 1st, 2nd, 3rd, 4th and 5th Rajahs, ranked according

" to their age, the senior being the first. On the death of " the 1st Rajah, the 2nd succeeds and becomes the senior, " the 3rd becomes 2nd, and so on to the 5th, the vacation of " which rank is filled by the oldest of the Atchimars. By " this mode of succession, the eldest Rajah is very far " advanced in years before he accedes to the seniority, in " consequence of which it used to be customary to entrust " the ministry of the country to one of the Atchimars chosen " by the Rajah. * * *

" The eight Edoms of Atchimars abovementioned mutiplied " so numerously in their members that they afterwards " divided and formed themselves at pleasure into separate " Edoms, which they distinguished by their own names. The " number now in existence consists of 27; 20 belonging to " the Northern and 7 to the Southern branch. The number " of Atchimars they contain including minors is about 130."

And in Mr. Logan's Preface to his collection of records relating to Malabar, he thus describes the family of the Zamorin:—

" There were at the time when Malabar fell to the " British, as there are now, three *Kovilagams, viz:*

" 1. The Eastern or Kirake.

" 2. The Western or Padinyara.

" 3. The New or Pudiya.

" The eldest female (of the three *Kovilagams*) enjoys " certain of the common lands attached to what is called " the Ambadi *Kovilagam* and is regarded as the holder of " a *Stanam* or dignity. Next after her follow in succession " the five eldest males of the *Tarwad* who stand in the " order of their respective ages, and who are known respec- " tively as

" 1. The Zamorin, Samori or Tamudri Rajah.

" 2. The Eradipad or Eralpad.

" 3. The Munalpad.

" 4. The Edralpad.

" 5. The Nediripu Muthu Eradi.

"To each of them a certain portion of the *Tarwad* "property is allotted to enable him to maintain his *Stanam* "or dignity, and he is called a *Kur Vaycha* or joint "Ruler."

The earliest decision of the Courts related to the Stanam of Kolattiri or Senior Rajah of the Kola family. The senior member of the two ancient *Kovilagams*, styled Odeamangalum and Pally sued to recover the arrears of *Malikana* paid by the British Government to his junior who had been recognized as *Stani*, to recover possession of the lands and Temples appurtenant to the *Stanam*, and for his recognition by the members of all the five *Kovilagams* which formed subdivisions of the Pally *Kovilagam*, *viz.*, Tevanangote, Chengul, Padinyara, Kavanisheri and Cherikel, as head of the family and Senior Rajah. He was supported by the heads of four *Kovilagams* but resisted by the head of the Cherikel *Kovilagam* who contended that since the invasion of the ancient Kingdom of Kolattanad by the Ikkeri Rajah in 1738, the management of the estates had by agreement been vested in his branch, and that he and his ancestor had exercised rights of sovereignty, concluded treaties and been in enjoyment of the *Malikana*. The Provincial Court dismissed the suit on the ground that it had been decided by Mr. Rickards the Collector in 1803 that the head of the Cherikel branch was entitled to the dignity and emoluments of Senior Rajah and that that decision had been acquiesced in by all collateral branches of the family for 17 years. The plaintiff appealed to the Sudr Court on the ground that he was no party to Mr. Rickard's decree and that since Hyder's invasion of Malabar the *de jure* Rajah had resided in Travancore and had appointed the head of the Cherikel *Kovilagam* as his deputy. The Sudr Court decided against the plaintiffs' claim on the ground that when Tippoo conquered Malabar, the ancient Kingdom of Kolattanad ceased to exist and that when the British Government acquired Tippoo's Malabar possessions in 1792, they made a fresh grant of a portion of the Kolattanad possessions to the Cherikel branch

of the family which was not liable to be called in question. (Sud. Dec. I. 293).

A description of the *Stanams* in the Royal family of Calicut is given in the Judgment of the High Court in A. S. 59 of 1879 (Turner, C. J., and Muttusami Aiyar, J). The Judgment proceeds:—" All property acquired by the " holder of a *Stanam* which he has not disposed of in his " lifetime or shown an intention to merge in the property " attached to the *Stanam*, becomes on his death the property " of the *Kovilagam* in which he was born." (I. L. R. III. Mad. 141).

The ancient practice of setting apart male and female properties is still maintained in the family of the Punnatur Rajah (Cf. A. S. 258 of 1882, South Malabar). It was also adopted by Nayar families of distinction until discountenanced by the High Court who refused to recognize any distinction between property so set apart for females and the common *Tarwad* property. (II. Mad. H. C. Rep. 41).

Stanams in Nayar families of distinction usually follow the same rule as *Stanams* in Royal families. Succession to them is by priority of birth in two or more families which have separated from a parent stock. The *Stanams* are frequently known by the name of Muppa *Stanam* and Elama *Stanam*. In rare instances, succession to the junior *Stanam* is not by seniority but by selection, the right of which is vested in the senior *Stani*. Instances of this may be found in R. A. 37 of 1874 and R. A. 58 of 1880 (High Court). The practice of creating a Karnavan *Stanam* in a single family was effectually stopped by the decision of the High Court in S. A. 359 and 401 of 1870 which I have quoted at length in my Chapter on the Rights and Obligations of Karnavans. (VI. Mad. H. C. Rep. 401).

In A. S. 407 of 1867, the High Court (Scotland, C. J., and Ellis, J.) had before them a case from South Canara in which the object of the suit was to establish the right of the Plaintiff to be installed in the *Pattam* or office of dignity in

the family to which certain advantages and highly prized customary honors were attached. The question for decision was whether the dignity descended to the eldest male of the two divided branches or to the eldest male of the senior branch. No reference was made to the Malabar custom in the case of *Stanams* though the argument would have been strictly relevant. But the High Court decided in favour of the senior male of the two divided branches. (IV. H. C. Rep. 28).

(3). Alienations by a Stani.

The leading case in the Sudr Court was S. A. 63 of 1852. The Judges (Morehead and Strange) disallowed a permanent lease granted by the 4th Rajah of Calicut. They say:—

" On reference to document No. 1 upon which this suit " is founded, the Court of Sudder Udalut find that the trans- " action involved a loss of 90 parrahs per annum to the " *Stanam,* the amount having been remitted to plaintiff " under the deed out of the rent payable on the land, as a " free Brahminical gift. The tenure of the *Stanam* is only " a temporary one and it is clear that the holder thereof " cannot be authorized thus to alienate its revenue. (Mad. Sud. Dec. 1853, p. 216).

In O. S. 14 of 1855, Mr. Holloway, as Sub-Judge of Calicut, in dealing with the sale of *Stanam* property, says:— " The nature of *Stanam* property according to the custom " of Malabar is such that the present holder has in it a life " interest only and the successor derives no benefit there- " from during the life of the present holder. It is obvious " therefore that the burden of proving that the alienation of " *Stanam* property was for recognized and proper purposes " lies upon him who asserts it. If in the much weaker case " of *Tarwad* property, a valid alienation cannot be made " without the consent of the principal subordinate members " who must nevertheless be presumed to benefit by the pro- " ceeds, still clearer must be the proof that the alienation of

" *Stanam* property is for some purpose tending to the con-" servation or improvement of the property for those who " are to succeed where such successors participate during " the lifetime of the alienor in none of the proceeds." (Zillah Dec., Calicut, July 1856, p. 39).

And again in S. A. 263 of 1860, the Sudr Court (Strange and Frere, J. J.) refused to recognize a mortgage of the *Stani's* interest beyond his life time. They say:—

" The Court observe that the allowance in question " being one for the maintenance of a dignity, was personal " to the individual possessing the dignity and also inalien-" able therefrom. The previous Nayar could not hypothe-" cate it beyond his lifetime as it had to pass with the " *Stanam* to his successor." (Mad. Sud. Dec. 1861, p. 20).

In A. S. 254 of 1860 (Tellicherry) Mr. Holloway, as Civil Judge, upheld a mortgage of *Stanam* property granted by a *Stani* in consideration of the mortgagee withdrawing his claim to enforce a judicial sale, holding that to get rid of a troublesome judicial enquiry must be construed as an act for the protection and benefit of the *Stanam* property.

In A. S. 227 of 1862 (Tellicherry) Mr. Sullivan held that a *Stanam* holder had no legal authority to execute a deed which from its conditions entailed permanent loss to the *Stanam*. His Judgment was confirmed by the High Court in S. A. 71 and 72 of 1864.

Again in S. A. 383 of 1876, the Judgment of the High Court (Morgan, C. J., and Holloway, J.) contains the following observations on the alienability of *Stanam* property:—

" In the case of the Zamorin, there are decisions that " the property of his house is held on terms different to " those of others. In his case, however, it has never been " decided that the property attached to his *Stanam* is not " liable for debts incurred for its conservation." (I. L. R. I. Mad. 89).

And in S. A. 167 of 1881, the High Court (Innes and

Muttusami Aiyar, J. J.) held that the grant of a perpetual lease at a fixed rent is not necessarily beyond the power of a *Stani.* "Such a grant," they say, "may be highly "prejudicial to the estate, but in the present instance, the "recognition of it by no less than eight successive *Stanam*-"holders is strong evidence upon which the Courts might "properly find that the grant is not injurious to the estate, "and they have so found." (I. L. R. IV. Mad. 149).

In the case of the Kongat Nayar, I held in A. S. 377 of 1881 (South Malabar) that the sale of the *Stanam* house in execution of a money decree against him could only affect his life interest. I quote from my Judgment the following passage:—"The Kongat Valiya Nayar is a member of the "ancient aristocracy of Malabar, who was a petty chieftain "at the time of the British occupation, with whom a tempo-"rary settlement was made, and who received a *Malikana* "allowance in lieu of his former privileges when those privi-"leges were resumed. On public grounds it might, I think, "be held that the property held by the senior representative "of such families was held under a strict entail, and that he "could not alienate it unless for some purpose which was "proved to be absolutely essential to the conservation of the "*Stanam.* Such, I conceive, would be the principle on "which the Courts would act in the case of the Rajahs of "Calicut and other superior Rajahs of the District. And if "voluntary alienation was not permissible, alienation by "process of law would not stand on any higher footing. "It may, of course, be that properties belonging to the "*Stanam* have been encumbered or money borrowed with "the consent of the heir apparent to the *Stanam*, and in "such cases the strict entail would be broken."

In A. S. 142 of 1882 (South Malabar) I held that a suit would lie by the immediate reversioner to declare the invalidity of encumbrances created by a *Stani.* After quoting the decisions of the Privy Council on the subject of suits by reversioners to restrain a female proprietor from acts of waste and the principles laid down in those

decisions, that such suits were admitted *ex necessitate rei;* that the Courts must exercise their discretion whether to admit them or not, and that if admitted, they must be confined to the one object of questioning the particular transaction, the Judgment proceeds:—" It has doubtless " been held on more than one occasion that in suits to set " aside alienations made by a *Stani*, the cause of action does " not accrue till the estate falls in by succession. In other " words, however imprudent the alienation, the alienee will " at all events take the life estate of the alienor. But I can " see no reason why the reversioner should not be allowed to " come in and ask for a declaratory decree that the aliena- " tion is not binding on the *Stanam*. Further relief he " probably could not ask, except in rare cases, where the " *Stani* was found to be insane or incapable of managing " his affairs. The grounds on which I think that a rever- " sioner ought to be allowed to ask for a declaratory decree " are principally that lapse of time will often render it impos- " sible to bring trustworthy evidence of the invalidity of " the transaction, that the property may change hands and " pass from the original alienee to an innocent purchaser, " and that if the transaction is found to be invalid, the " original alienee ought to have an opportunity of recover- " ing his money from the alienor."

In suits to set aside alienations made by a *Stani* (and a permanent lease is an alienation, Cf. I. L. R. IV. Mad. 148), it has been held that limitation commences to run from the date of the alienor's death.

(3). Debts contracted by Stanis.

In A. S. 7 of 1843, the Sudr Court had before them a suit in which it was sought to recover a debt due by a deceased Rajah during the time that he occupied the position of Munalpad or third Rajah of Calicut from the heads of the *Kovilagam* to which he belonged as his legal heirs. The following extract is taken from the Judgment:—

" It is a fact well known to all and therefore only

" requiring mention, that between the junior members " or *Tambirans* residing in the different *Kovilagams* or " Palaces, and their senior relations filling any of the *Kur* " *vaychas* or Rajahships, there is not, and cannot be from " the nature of things, any reciprocity of interest or right " to each other' sproperty, their establishments, income and " duties being distinct and under separate management.

" The *Kovilagam* is the family residence in which all " who have not succeeded to one of the Rajahships remain " under the management of the eldest resident female or " *Tambiratti* of each branch of the family.

" The *Kur vaycha* or Rajahship is the dignity to which " each male succeeds according to the priority of birth, no " matter to which of the *Kovilagams* or families he may " belong.

" Besides the abovementioned, there is a sixth *Kur vay-* " *cha* or dignity which is always filled by the eldest Tambi- " ratti or female of the family, no matter with which of the " *Kovilagams* she may be connected, whose proper residence " is the Ambady *Kovilagam*. Like the other Rajahships and " *Kovilagams*, her own income, *Malikana* allowance from " Government, and establishment are distinct and under " separate management.

" It is obvious from these arrangements that although " all are originally of the same stock, yet that an impassable " line of distinction has been drawn between the interests of " each branch of the family and the interests of such " members of these families who may in after life respec- " tively succeed to the Rajahships. The one can exercise " no control over the acts of the other, and where there is " no control, there can be no lawful responsibility."

The final decision was that the defendants were only liable to the extent of the assets, real or personal, which could be proved to have been acquired from the estate of the deceased Munalpad or 3rd Rajah.

In O. S. 59 of 1855, Mr. Holloway, as Subordinate Judge of Calicut, had before him a case in which it was sought to recover a bond-debt incurred by a previous *Stani*, either from the successor to the *Stanam* or from the head of the debtor's family. The Judgment is as follows :—" I " consider the 1st defendant as possessor of the *Stanam* " property responsible for the debt only so far as it was " contracted for the benefit of that property, but the real " difficulty is in determining whether proof of the application of the money borrowed is on the plaintiff or upon " the 1st defendant. Where money is borrowed by the possessor of the *Stanam*, should it be presumed that the loan " is for the benefit of the *Stanam* until the contrary is " proved, or should it be upon the lender, when seeking to " enforce an obligation against the borrower's representatives, to show that the loan was really for the use of the " *Stanam* and that its present holder enjoys its fruits ? In " the case of a *Karnavan* of a *Tarwad* contracting a loan, the " presumption is undoubtedly that it was for the family " benefit. He is the representative of the family and the " protector of all its subordinate members, but it appears to " me that the case of a *Stanam* is different. During the " life of the holder, the subordinate members have no right " or interest therein, but upon his decease, it passes to the " next senior member. I am of opinion, therefore, that it " lies upon those who have lent money to show that in " consequence of its having been expended for the benefit " of the *Stanam* property, the present inheritor of that property is liable for its liquidation. The lender clearly " knowing the risk run in such transactions with men whose " rights are of this character, will have no right to complain." The Judgment then proceeded to hold that the 1st defendant was liable for the amount which was found to have been *boná fide* expended for the repair of a choultry and that the 2nd defendant, who was found to have received arrears of Malikana due to the previous *Stani*, was liable for the balance. (Zillah Dec., Calicut, November 1855, p. 17).

And again in A. S. 43 of 1855 (Calicut) which was also a suit for a bond-debt incurred by a previous *Stani*, Mr. Holloway, as Sub-Judge, says :—" The case of a *Stanam* " differs much from that of a *Tarwad*, and the circumstances " of the case require the *onus* of proving a liability to have " been incurred on behalf of a *Stanam* by the deceased " holder to be laid on him who asserts it. Moreover, I am " of opinion that the purpose must be such as tends to " increase to improve or conserve the material property of " the *Stanam*, and that a benefit to the living member is " not such an occasion as justifies a loan. Whatever the " advantages of a pilgrimage, it is quite clear that it must " be individual and not of much benefit to the successor." (Zillah Dec., Calicut, February 1856, p. 16).

In a recent case before me (A. S. 193 of 1882) it was sought to hold the then senior Rajah of Palghaut liable for a debt incurred by his predecessor. I dealt with the question thus :—" The short question is whether a Malabar " Rajah is liable for the simple debts *bonâ fide* incurred by " his predecessor. As pointed out by Mr. Mayne, in Sec. " 273 of his work on Hindu Law, the liability of one person " to pay debts contracted by another arises from three com- " pletely different sources which must be carefully distin- " guished. These are, first, the religious duty of discharg- " ing the debtor from the sin of his debts; secondly, the " moral duty of paying a debt contracted by one whose " assets have passed into the possession of another; thirdly, " the legal duty of paying a debt contracted by one person " as the agent, express or implied, of another. Cases may " often occur in which more than one of these grounds of " liability are found co-existing, but any one is sufficient. In " the present case, we are only concerned with the moral " duty, and if 1st defendant derived no assets, he cannot be " held responsible.

" The position of senior Rajah or second or third Rajah " in a Malabar Royal family is a peculiar one. He suc- " ceeds to the *Stanam* or dignity by seniority. Certain

" lands are set apart for the maintenance of the dignity " and in addition he receives a Government *Malikana.* He " has an absolute right to the income, but cannot alienate " the *corpus* of the estate except under special circum- " stances. Accumulations made by one Rajah, if undisposed " of in his life-time, do not pass to his successor but to his " *Edom;* and in the Palghaut family, it is usually the case " that a Rajah who succeeds to one of the dignities is little " better than a pauper, and that his first act is to borrow. " If he borrows on the security of his *Stanam* property, the " secured creditor has this advantage, that when he sues for " his money, he is entitled to an issue whether the debt is " binding on the *Stanam.* If he contracts a simple debt, " the unsecured creditor can only be held to have given him " a personal credit.

" Even in the case of a Zemindar or Poligar, it has " been recently held (I. L. R. III. Mad. 145) that *primâ* " *facie* the money he borrows, except on the mortgage of " the estate, is raised on his own personal credit for his " own benefit and purpose, and not on the credit of the " family estate or for the purposes or benefit of the family. " The case of the Zemindar is complicated by his being at " once proprietor of the estate and head of an undivided " family. The case of the Rajah is simple, as when he " succeeds to the *Stanam* or dignity of Rajah, he renounces " his position in the *Edom* or family to which he belongs. " His estate is analogous to that of a Hindu widow."

CHAPTER XV.

Temples.

THERE are said to be four classes of Temples in Malabar, *viz* :

(*a*). Ancient Temples founded by Parasu-rama.

(*b*). Temples founded by the Rajahs.

(*c*). Temples founded by village communities or individuals.

(*d*). Temples founded by devotees from alms received.

In the language of the people, the manager of a temple of the first two classes is said to be subordinate to the temple, whilst in the last two classes, the temple is said to be subordinate to the manager.

The general superintendence of all endowments is vested in the Sovereign and is termed Melkoy ima. When the sovereign power of Malabar Rajahs ceased to exist, the Melkoyima vested in the British Government. The chief offices in the temple are termed Uraima, Samudayam, Karaima, Shanti and Pattam. The Devasam is a corporation sole and acts through its Uralars or managers. If there is a difference of opinion between the Uralars, the will of the majority prevails. The Devasam can sue and be sued only in the name of its Uralars. The

Uralars have no authority to alienate trust property but they may create subordinate tenures in accordance with local usage, and raise encumbrances if money is *boná fide* required for the purposes of the Devasam. The Uralars have no authority to transfer their office and its duties together with the trust property to a stranger.

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(1). The general superintendence of all endowments is vested in the Sovereign and is termed Melkoyima.

The Melkoyima right is thus described by Mr. Holloway in A. S. 118 of 1861 (Tellicherry) :—" This is not only not " the same, but is absolutely incompatible with ownership. " It was the right of the sovereign power possessed over " property of which the legal ownership was in others. That " sovereign power and the right of interference, which " nothing can prevent these Malabar Rajahs from attempt- " ing, have of course wholly ceased. That the Rajah has " been entered in the account as the appointor of the " people exercising authority, is explicable upon precisely " the same ground. Doubtless at the period at which these " trustees were appointed, he would at his pleasure not only " have appointed but also removed any person who dis- " pleased him." (Cf. printed paper in S. A. 477 of 1870).

In A. S. 501 of 1876 (South Malabar) I thus described the Melkoyima :—" The Melkoyima is nothing more than " the right (which Hindus and Mahomedans alike admit) of " the ruling power to interfere in the case of disputes or " fraudulent practices occurring, and which right the British " Government virtually assumed when they enacted Regu- " lation VII of 1817."

The Melkoyima which is thus vested in the British Government has unfortunately been allowed to fall into abeyance. In a recent case, it was held by the High Court

(Innes and Tarrant, J. J.) that Act XX of 1863, which gives summary power to the Courts to fill up a vacancy in the office of Trustee, was not applicable to Malabar. (I. L. R. III. Mad. 401).

(2). The chief offices in a temple are termed Uraima, Samudayam, Karaima, Shanti, Pattam.

The *Uraima* originally denoted the right of the heads of the village community to regulate the affairs of the village temple. It was subsequently applied to those who founded temples and constituted themselves managers, and to those who were appointed as managers of temples by the Rajahs.

The *Uraima* is invariably vested in families and is hereditary. It is exercised by the head of the family. When the family owning the *Uraima* becomes extinct, the right of nominating a fresh trustee is with the sovereign. In O. S. 1 of 1860 (Tellicherry) Mr. Holloway says :—" The appoint-" ment of fresh trustees lay with the sovereign power acting " either through their Courts of Justice or otherwise."

The Temple Pymash accounts of 1822 form an official record of the families then entitled to the *Uraima* of the temples, but they cannot be regarded as conclusive evidence on the subject. Many changes have taken place since those accounts were prepared. New trustees have been admitted with the consent of the general body of trustees, and actual possession of a *Devasam* and its properties for more than 12 years will probably be held to confer a possessory, if not a proprietary, title to the *Uraima.*

In A. S. 118 of 1861 (Tellicherry) Mr. Holloway appears to have been of opinion that the whole body of trustees may add to their numbers. And in A. S. 240 of 1880 (North Malabar) the Sub-Judge upheld the introduction of a new *Uralan* with the consent of a majority of the whole body. But in S. A. 579 of 1881, the High Court held that the act was *ultra vires.*

The *Samudayi* was originally the committee of manage-

ment who managed on behalf of the body of *Uralars*. Sometimes the management was vested in a single *Uralan* who became *Samudayi*. The term subsequently came to be applied to any person appointed as an agent of the *Uralars*. Sometimes the office was hereditary. A *Samudayi* who is himself an *Uralan* stands on a higher footing than one who is a mere agent. His powers will of course depend upon the terms of his appointment. Mr. Holloway, when in Malabar, waged a fierce war against the *Samudayis*, some of whom set up a title independent of the *Uralars*, and invariably treated them as agents liable to dismissal by the *Uralars* or a majority of them. As an instance, I may refer to the case reported in Zillah Dec., Calicut Sub-Court, December 1856, p. 25.

In S. A. 90 of 1858, the Sudr Court (Hooper, Strange and Phillips, J. J.) remanded A. S. 360 of 1856 to the Civil Judge of Calicut, to find whether plaintiff was the *Samudayi*, and if so, what were his powers. The Civil Judge found that plaintiff was not the *Samudayi* and the second issue was not tried.

The High Court, following Mr. Holloway, have invariably treated the *Samudayi* as a mere agent.

Any temple servant who possesses an hereditary right to perform any particular service in a temple is said to have a *Karaima* right. Such a servant is only liable to removal for proved misconduct. (Cf. Sud. Dec. 1854, p. 82, and IV. Mad. H. C. Rep. 63).

In O. S. 1 of 1860 (Tellicherry) Mr. Holloway says:—
" The office of *Karalan* is as well understood as anything
" can be. It entitles the holder to the performance of cer-
" tain services in the pagoda to which he is attached."

The *Shanti* is the priest or worshipper of the temple and usually holds office for one year during which time he must reside within the precincts of the temple. He is remunerated by wages and certain perquisites.

The *Pattamali* is the rent collector and is usually a mere paid servant of the *Uralars*, but his office is sometimes hereditary.

(3). The Devasam is a corporation sole and acts through its Uralars or managers. If there is a difference of opinion between the Uralars, the will of the majority prevails.

In A. S. 36 and 37 of 1862 (Tellicherry) Mr. Holloway thus describes the position of *Uralars* :—" At the period of " the execution of the contract No. 1, the three trustees " were in possession with equal powers and equal rights. " For certain specified purposes, for a period of three years, " the management with certain restrictions was to reside in " 3rd defendant. It is obvious that there was no divesting " of possession, and that at the expiration of the period, the " possession and the management returned to their original " state. The incidents to such a corporate body are that " the majority may, of their own will, do any acts not incon- " sistent with the design of their original formation. This " is a plain rule in every known system of jurisprudence."

The right of the majority was recognized by the High Court in S. A. 128 of 1879.

If, as frequently happens, the right of management has for years resided in the family of one *Uralan*, the Courts will presume that it is with the assent of the other *Uralars*, and will be slow to disturb the arrangement at the suit of another *Uralan*. Of course, it may be shown that the delegation was temporary or personal to an individual and ceased with his death.

The practice of allowing tenants in suits of ejectment by the managing *Uralan* to collude with another *Uralan* and oppose the suit, was justly reprehended by Mr. Holloway. In. A. S. 301 and 302 of 1855 (Calicut) he says :—" The Munsif misapprehended the purport of the " objection of the defendants below, that the right of " management was in the hands of others as well as of those " who authorized the present plaintiff to sue. The object

"was to show that the plaintiff had no right to sue; "that he had no standing place in the Courts. This mis-"apprehension, I am aware, is very widely spread, and "by its general adoption, men are led to believe that by "securing one man of a set of joint managers to their side, "they will be enabled to commit any fraud upon the pro-"perty managed because there will be no means of bring-"ing a suit. It is however clear that where acts are neces-"sarily injurious to the common interest of a large number "of persons, a few of them may institute a suit for relief "on behalf of themselves and the rest, although the "majority approve of those acts and disapprove of the "institution of the suit. A tide of authorities might be "quoted for this position. It is sufficient to advert to the "Judgment of the Vice-Chancellor of England in *Bromley* "v. *Smith.* Any other doctrine would of course be produc-"tive of the most monstrous consequences. This case "clearly falls within the rule. The object of the managers "of the *Devasam* is to set aside a claim to the land which "is part of the property of the *Devasam,* and to procure "its return from a mortgagee who has violated his covenant "and to recover balance of rent. This is clearly the inter-"est of the whole body as managers of the *Devasam.*" (Zillah Dec., Calicut Sub-Court, May 1856, p. 5).

And again in A. S. 378 of 1855 (Calicut) Mr. Holloway, as Sub-Judge, says:—"As I pointed out in A. S. 301 and "302 of 1855, any act, plainly for the advantage of the "objects of a trust, may be performed by even one of the "trustees against the wish of all the others." (Zillah Dec., July 1857, p. 50).

(4). The Devasam can sue and be sued only in the name of ts Uralars.

It was formerly the practice to allow the *Samudayi* to sue on behalf of the *Devasam* and the High Court appear to have recognized the practice in S. A. 105 of 1870 and S. A. 367 of 1875.

In S. A. 286 of 1877, the High Court (Morgan, C. J., and Kindersley, J.) held that the question whether a *Samudayi* could sue was not in any way dependent on Sec. 17 of Act VIII of 1859. "The question," they say, "is "not whether there exists a recognized agent within the "meaning of the section, but whether the right of suit "resides (the particular circumstances of the case being "considered) in the manager (*Samudayi*) or the *Uralars*. "Ordinarily the principal, as the person who is owner or "has the beneficial interest, should sue and not one who is "merely an agent or servant. In some cases, an agent or "manager may have such an interest or may so contract "that he may bring a suit in his own name. Here the "suit was by the manager who had himself let the lands "by a writing in which he is so described. A question as "to his authority having been raised in the Courts of First "Instance, the *Uralars* were called and they deposed to "the plaintiff's authority to bring the suit. * * * "The suit would probably have been more correctly framed "if the *Uralars* had originally been made parties."

This was followed by S. A. 92 of 1880 (Kindersley and Forbes, J. J.) in which it was held that the objection that the suit should have been brought in the name of the *Uralars* or trustees and not in the name of the *Samudayi*, was well founded, and that the defect was not cured by the plaintiff holding an authority from persons who were not parties to the suit.

Again, in S. A. 482 of 1880, the High Court (Kernan and Forbes, J. J.) held that the *Uralars* are the persons in whom the estate and property of the temple is vested, and that the plaintiff, who termed himself a *Karaima Samudayi*, was an agent accountable to the *Uralars* and subject to be dismissed by them for misconduct. (I. L. R. II. Mad. 167).

And lastly, in S. A. 31 of 1881, the High Court (Turner, C. J., and Innes, J.) decided that a suit could not be maintained by a *Karaima Samudayi*. Mr. Justice Innes says:—

" The status of a *Karaima Samudayam*, put at the highest, " is merely that of an agent or manager who has a pro- " prietary and hereditary right in his office. The question " of whether he can conduct suits in his sole name on behalf " of the *Devasam* is one of procedure." (I. L. R. IV. Mad. 142).

With reference to these observations, I may observe that there is nothing in the etymology of the word *Samudayam* to import agency. The word primarily means an assembly, a council of Brahmins, committee for managing common property or the concerns of a temple (Gundert). At the same time I do not deny that the *Samudayi* is in many instances an agent of the *Uralars*. When the office is occupied by one of the *Uralars* themselves, it is possible that the question of his right to represent the *Devasam* may rest on different grounds.

In A. S. 114 of 1882 (South Malabar) I held that one *Uralan* sufficiently represents the *Devasam*. I said :—" There " is a long current of decisions to that effect in this and the " subordinate Courts. These decisions may be justified on " the ground of convenience which was the *ratio decidendi* " in the case reported at III. Mad. H. C. 226, and is the " principle on which a *Karnavan* is allowed to represent the " *Tarwad*, or on the ground that among a body of trustees " there is no objection to the delegation of the trust to one " of such trustees. The case of a *Samudayam* who is merely " an agent of the *Uralars*, stands on a different footing. * * * " Again, there is, it seems to me, a distinction between a " *Sabha* or College and a *Devasam*. In S. A. 736 of 1880, " the High Court decided that the Committee of the *Sabha* " had no *locus standi*, and that all co-owners of property " must join in a suit to recover such property."

The question came again before me in A. S. 246 of 1882 (South Malabar) from the Judgment in which I extract the following passage :—" It has been my constant endea- " vour for more than six years to reduce, as far as possible,

" the constant dissensions among *Uralars*, which are at once " degrading to the good sense of respectable people and " ruinous to the trust property which they represent. With " this end in view, I have again and again held that one " *Uralan* sufficiently represents the *Devasam* in suits when " a majority concur in vesting him with the powers of " management. * * * I shall regret exceedingly if the High " Court decisions render it imperative for every *Uralan* to " become a party to the suit when suits are brought on " behalf of a *Devasam*. I am convinced that such a rule " would tend to promote internal dissension and, as so often " happens now, one *Uralan* will side with the tenant for the " purpose of resisting his co-*Uralan*."

If the *Uralars* are in future to be treated as legal co-owners of the *Devasam*, then it will be necessary that all should join in conducting suits on behalf of the *Devasam*.

In A. S. 736 of 1880, the High Court (Turner, C. J., and Kindersley, J.) say :—" Unless where, by a special " provision of law, co-owners are permitted to sue through " some or one of their members, all co-owners must join in " a suit to recover their property. Co-owners may agree " that their property shall be managed and legal proceed- " ings conducted by some or one of their number but they " cannot invest such person or persons with a competency " to sue in his own name on their behalf, or, if sued, to " represent them. It may indeed happen that a suit by " one of several co-owners can be successfully maintained " against a tenant. This is the case when the tenant has " dealt with such co-owner as sole landlord, and by so deal- " ing is estopped from denying the title of the person who " has let him into possession." (I. L. R. III. Mad. 235).

(5). The Uralars have no right to alienate trust property but they may create subordinate tenures in accordance with local usage.

On the general question, reference may be made to two cases in the Privy Council, reported at L. R. II. 145 and IV. 52.

The leading case in the Sudr Court is S. A. 10 of 1847, in which the Court say:—" It is clear that as the 1st " defendant was not sole *Uralan* and manager of the pagoda " in question, his having alone mortgaged the pagoda lands " and recovered the mortgage amount from the plaintiff " without the knowledge and consent of the other *Uralars* " was illegal, although had the transaction taken place with " their consent and for the benefit of the pagoda, such " temporary transfer of the lands to the plaintiff could " not have been objectionable as contrary to the Regula- " tion (VII of 1817)."

In R. A. 64 of 1861, however, the Sudr Court appear to have drawn a distinction between public and private *Devasams* and to have held that by the custom of Malabar the lands attached to a family pagoda are alienable as any other private possession. (Sud. Dec. 1862, p. 90).

When, as frequently happens, mortgages are created by *Uralars* in favour of members of their own families, that circumstance alone is strong presumptive evidence of fraud. (Cf. printed papers in S. A. 339 of 1881).

(6). The Uralars have no authority to transfer their office and its duties together with the trust property to a stranger.

This matter is so fully dealt with in the appeal before the Privy Council, reported at I. L. R. I. Mad. 235, where all the authorities are collected that it is unnecessary to do more than refer to that case.

In A. S. 357 of 1881 (South Malabar) I had before me a similar case to the one decided by the Privy Council with this exception, that the deed of assignment alleged the payment of antecedent debts due by the *Devasam* and repairs of the *Devasam* by way of consideration. I refused to recognize any distinction between the cases. My decision was confirmed by the High Court in S. A. 781 of 1881.

APPENDIX I.

Notes of decisions on Procedure in Malabar suits.

(1). In redemption suits, where the mortgagee admits the original title of the mortgagor but sets up a sale, the burden of proof is on the mortgagee.

Sudr Decisions, 1858, page 26
" " 1859, " 22
" " " " 99

(2). In redemption suits, where the mortgagor sets up one mortgage and the mortgagee admits another mortgage, relief may be granted on the admission of the mortgagee.

Sudr Decisions, 1862, page 28
IV. Mad. H. C. Rep. " 359

(3). For purposes of jurisdiction as well as for stamp purposes, redemption suits must be valued on the principal sum expressed to be secured by the instrument of mortgage. S. A. 201 of 1878 (High Court) Full Bench.

(4). The compensation payable for improvements is not part of the principal sum expressed to be secured and need not be taken into consideration in valuing the suit. S. A. 474 of 1880 (High Court) Full Bench.

(5). A claim for the removal of a Karnavan is incapable of valuation. It would clearly be erroneous to value it as a claim for the recovery of possession of land, for the possession of the land is throughout in the *Tarwad* and is not affected by a change in the person who fills the office of manager.

A. S. 119 of 1881. (Mad. H. C.)
Ind. L. Rep. IV. Mad. 146.

(6). The decision of an issue in a suit by an oath of one of the parties is an adjudication on the particular subject matter of the suit, but cannot be pleaded as an estoppel in a subsequent suit. S. A. 247 of 1881.

N. B.—The usual mode of proving an old demise in Malabar is by the production of the *Marupattam* or unsigned

copy of the demise retained by the *Jenmi*. This is corroborated by the Pymash accounts, and in some instances by a *Grandhavari* or *Kuttikanak*, which are rent rolls kept by the Devasams and aristocratic families.

In later demises, the usual evidence is the *Kychit* or agreement signed by the tenant and retained by the *Jenmi*. In many cases, the tenant has no corresponding document.

Since the Registration Acts have become widely known, every document executed is carefully registered.

APPENDIX II.

Chronological table of events connected with Malabar history.

A. D.

750—800. Erection of the Jewish and Syrian communities into principalities by the Chera Perumal. Decline of the Chera dynasty.

824. Abdication of the last of the Chera Perumals or Emperors.

825—900. Rise of the four principalities:—
Kolla Swarupam=Kola.
Nediyirup Swarupam=Zamorin.
Perimpstap Swarupam=Cochin.
Tripa Swarupam=Travancore.

900—1498. Consolidation of the kingdom of the Zamorin of Calicut.

1498. Arrival of the Portuguese at Calicut. Declaration of war between the Portuguese and the Zamorin.

1503. Portuguese build the fort of Cochin.

1523. Portuguese build the fort of Cranganore.

1539. Peace concluded between the Portuguese and the Zamorin.

1565. Migration of Jews from Cranganore to Cochin.

1594. Declaration of religious war by Portuguese against the infidels of Malabar. Organization of Dutch East India Company.

1599. Synod of Diamper. Proselytism of Syrian Churches by Archbishop Menezes of Goa.

1600. Establishment of English East India Company.

1642. Establishment of French East India Company.

1656. Appearance of the Dutch in India. Compete with the Portuguese for the West Coast trade.

1663. Portuguese Cochin capitulates to the Dutch.

1664. Settlement of the English at Calicut.

1680. Settlement of the English at Tellicherry.

1701. War between the Dutch and the Zamorin.

1714. Settlement of the English at Anjengo.

1717. Peace concluded between the Dutch and the Zamorin.
1720. Settlement of the French at Mahe.
1736. Invasion of North Malabar by Ikkeri or Bednore Rajah.
1740. War between the Dutch and Travancore.
1751. Second invasion of North Malabar by Ikkeri or Bednore Rajah.
1752. Settlement of the French at Calicut.
1753. Peace concluded between the Dutch and Travancore.
1755. Invasion of Cochin by the Dutch.
1757. Alliance between Cochin and Travancore against the Zamorin. Re-conquest of Cochin territory annexed by the Zamorin.
1762. Renewal of alliance between Cochin and Travancore. Peace concluded with the Zamorin.
1766. Mysore invasion of Malabar by Hyder.
1768. War between the English and Hyder.
1774. Second Mysore invasion of Malabar by Hyder.
1784. Peace concluded between the English and Tippoo.
1788. Mysore invasion of Malabar by Tippoo. Flight of Malabar Princes to Travancore. First treaty between the English and Travancore.
1789. Travancore refuses alliance with Tippoo. War declared between Tippoo and Travancore.
1790. Alliance between the English and Cochin.
1792. Cession of Tippoo's Malabar possessions to the English.
1795. Dutch Cochin capitulates to the English. Second treaty between the English and Travancore.
1799. Fall of Seringapatam. Partition treaty. Wynad annexed to Malabar.
1805. Third treaty between the English and Travancore.

APPENDIX III.

Note on the Administration of Justice in Malabar from 1792, A. D.

When Tippoo's Malabar possessions were ceded to the British by the treaty of Seringatam in 1792, A. D., they were at first governed by a Supervisor with his head-quarters at Calicut and two Superintendents with their head-quarters at Tellicherry in the north, and Cherpulsheri in the south. The Supervisor had an Assistant attached to him who was vested with Civil, Criminal and Police jurisdiction in Calicut and its vicinity. The Superintendents exercised a like jurisdiction in the outlying districts. From 15th October to 15th March, they were directed to go on circuit through the several parts of their respective districts, halting in each for as many weeks as the business might require.

This arrangement was subsequently superseded by the appointment of three Commissioners with a number of subordinates who acted in their respective circles as Magistrates and Collectors. In 1800, there appear to have been two Commissioners and nine Collectors (Buchanan, vol. II).

In 1802, the judicial was separated from the executive administration. A Provincial Court was established at Tellicherry presided over by three Judges, two of whom periodically went on circuit. Zillah Courts were established at Tellicherry and Calicut, and a Register's Court at Calicut. In 1812, an auxiliary Zillah Court was established at Cochin.

All these Courts were abolished in 1843. Civil and Sessions Courts were established at Tellicherry and Calicut, a Subordinate Court at Calicut and Principal Sudr Amins' Courts at Tellicherry and Cochin.

In 1862, the Subordinate Court at Calicut was converted into a Principal Sudr Amin's Court.

In 1873, the designation of the Courts was changed. The Civil and Sessions Judges became District and Sessions Judges of North and South Malabar. The Principal Sudr Amins became Subordinate Judges.

District Munsifs' Courts were established in 1816. Previous to this, there had been Commissioners' Courts at some of the outlying stations. There were a Mufti Sudr Amin's Court and a Pundit Sudr Amin's Court at Calicut and Tellicherry. The latter was abolished in 1853 and the former in 1862.

The number of District Munsifs' Courts has varied from time to time.

There are now 5 Courts in North Malabar, and 11 Courts in South Malabar at the undermentioned stations:—

In North Malabar.
1. Cavayi.
2. Chavasheri.
3. Tellicherry.
4. Badagara.
5. Quilandy (Pynâd).

In South Malabar.
1. Vyteri (Wynâd).
2. Calicut.
3. Parapangadi (Shernâd).
4. Manjeri (Ernâd).
5. Betutpudiangadi (Betutnâd).
6. Angadipuram (Walluvanâd).
7. Ootapalem (Nedunganâd).
8. Ponany (Kutnâd).
9. Chavakâd.
10. Palakâd (Palghaut).
11. Allatoor (Temelpuram).

There is also a Subordinate Magistrate at Anjengo with the powers of a District Munsif.

Malabar has always been a litigious country. Roughly speaking, not less than 12,000 Regular Suits and 18,000 Small Causes are tried every year, and the Appellate Courts deal with not less than 1,500 Appeals.

APPENDIX IV.

Lists of the Principal Devasams, Nambudri Houses, Prabhus, Nâdvalis, Stánis and Tarwads in North and South Malabar.

Devasams.

(i).

IN NORTH MALABAR.

1. Talipparamba.
2. Kanhirankat.
3. Trichamparath.
4. Payanore.
5. Ramen Thali.
6. Kankole.
7. Matayi Kavu.
8. Cherukunnath.
9. Payyavore.
10. Vayathore.
11. Kalari Vathukal.
12. Katalayi.
13. Chalayil.
14. Etakatu.
15. Oorpashi Kavu.
16. Peralasheri.
17. Kottiyore.
18. Thiruvangat.
19. Kollathpisharikal.

(ii).

IN SOUTH MALABAR.

1. Puthore.
2. Sreevalayanat Kavu.
3. Thiruvannôre.
4. Thaliyil.
5. Polur.
6. Perumanna.
7. Thrikandiyur.
8. Thriprangote.
9. Neramkythacotta.
10. Thirunavaya.
11. Chempravattam.
12. Thirumanthan Kunoo.
13. Guruvayore.
14. Thrikalayore.
15. Kodikunnathoo.
16. Panthalore.
17. Thiroovalathore.
18. Kalakulangara Emore Bagavathi.
19. Kachinankurishi.
20. Tripalore.
21. Pallavore.
22. Karikat.
23. Thrikalancottore.
24. Parakat Kavu.
25. Panamanna.
26. Cherupulacheri Kavu.
27. Ramapuram.
28. Manjeri Kunnathu.
29. Thrithala.
30. Thiroovapra.
31. Thrishivaperore Vadakunathan.*
32. Thiruvillamala.*
33. Iringalakotu Kudamanikam.*
34. Thriprayattoo.*

NOTE.—* These four Devasams are situated in the territories of the Rajah of Cochin, but own extensive landed estates in South Malabar.

Nambudri Houses.

(i).

IN NORTH MALABAR.

1. Kurumathoor Puliyapadamba.
2. Narikote.
3. Naduvath Podaver.
4. Iriveshi Podaver.
5. Edavalath Podaver.
6. Punthottathil Podaver.
7. Mundrote Pulippada.
8. Manial Kokkunnom.
9. Chembokunnath.
10. Puvakunnumel.
11. Mulur Pudukkudi.
12. Kutithala.
13. Kodallur Perur.
14. Meppalli.
15. Therathala Mallisheri.
16. Vengaprath Vareri.
17. Shekara Puliappada.
18. Karthiyeri Parappur.
19. Karisheri Parappur.
20. Eledath Kolasheri.
21. Padinhareth Kolasheri.
22. Ottupurakkel.
23. Palamritha Parappur.
24. Pappiniyote.
25. Eledath Mallisheri.
26. Muthedath Mallisheri.
27. Chirakoth Mallisheri.
28. Madathil Mallisheri.
29. Mothachira Mallisheri.
30. Varikote.
31. Valakal Kokkunnom.
32. Kodal Kokkunnom.
33. Puthukudi Kokkunnom.
34. Puthukudi Kolasheri.
35. Edathat.
36. Markanathil Perur.
37. Vadakoth Puliappadumba.
38. Karumarath.
39. Mannur.
40. Padinhattattu.
41. Panniyote.
42. Kiyathril.
43. Anakkayi.
44. Varanakote.

(ii).

IN SOUTH MALABAR.

1. Ayuvancheri Thamburakal.
2. Puvulli.
3. Kudeloor or Narrayari.
4. Olapanna.
5. Varikasheri.
6. Vemanjeri.
7. Kanhur.
8. Mathur.
9. Kolisheri.
10. Udiannur.
11. Mappat.
12. Oralasheri.
13. Poolanna.
14. Deshamangalath.
15. Kirangat.
16. Chittoor.
17. Elorushi.
18. Valappilli.
19. Akkarakurishi.
20. Akora.
21. Thirunavaya Vadiar.
22. Cherumukku Viedikan.
23. Thykat Viedikan.

24. Porayannur.
25. Edamana.
26. Cheramangolath.
27. Katambatta.
28. Puliannur.
29. Mudukurishi.
30. Elamkalath.
31. Mondredath.
32. Chovur.
33. Paledath.
34. Vyshravanath.
35. Kattumadath.
36. Padayikara.
37. Chovurumbetta.
38. Andalad.
39. Vatakedath.
40. Kaladi.
41. Chennas.
42. Alakath.
43. Ponpaku.
44. Naras.
45. Vatakumkara.
46. Vettath Oralasheri.
47. Paniarambatta.
48. Oluvil.
49. Kiyakadath.
50. Kakkat.
51. Shriharichedath.
52. Vettath Muthedath.
53. Kilurshi.
54. Kayadakkel.
55. Kavungal Mangalasheri.
56. Marat.
57. Naduvath.
58. Karivanambatta.
59. Maravanjeri Thekedath.
60. Maravanjeri Vadakedath.
61. Kelakkumpat.
62. Chembali.
63. Karavathedath.
64. Mathur Bhattedripad.
65. Muthringote do.
66. Melepat do.
67. Pandamparambath do.
68. Manhapatta do.
69. Chovur do.
70. Kanhoor do.
71. Avanhikat do.
72. Attupurath do.
73. Pakketh do.
74. Kodanad Valiyode do.
75. Kuruvat Avanamana.
76. Vatakini Edath.
77. Kanipayur.
78. Kiyakini Edath.
79. Patinhatti Edath.
80. Ottur.
81. Vadakancheri.
82. Alathur.
83. Kudalattupurath.
84. Kallur.
85. Tharananallur.
86. Kuruvayoor.

The 8 following Nambudri houses are designated Moosuds on account of their members having in ancient times been compelled to become professional physicians and practise surgery:—

1. Pulamanthol.
2. Kuttancheri.
3. Alathur Nambi.
4. Thykat.
5. Eledath Thykat.
6. Valloor.
7. Cheerattamannu.
8. Karanthole Nambi. (Extinct).

Prabhus, Nadvalis and Stanis.

(i).

IN NORTH MALABAR.

1. Karakat Edathil Nambiyar.
2. Kariat do.
3. Narangoli Cherakal do.
4. Kamprath do.
5. Kunnummal do.
6. Avanhiyat Nayar.
7. Koothali do.
8. Cheticheri Edathil Nambiyar.
9. Patinhara Edathil Nambiyar.
10. Eeettisheri Edathil do.
11. Kandoth Edathil do.
12. Choyali Edathil do.
13. Pudiatath Edathil do.
14. Kakat Vayunnavar.
15. Kiyakedath Nambiyar.
16. Chandroth do.
17. Kurungot Nayar.

(ii).

IN SOUTH MALABAR.

1. Kavalappara Nayar.
2. Venganat Nampidi.
3. Kottapatikal *alias* Punnathur Nampidi.
4. Kannanur Pata Nayar *alias* Kannambra Nayar.
5. Kuthiravathath' Nayar.
6. Nilambur Thacharakavil Thirumulpad.
7. Edavanna *alias* Amarampalath Thirumulpad.
8. Manchari Karnavapad (Thirumulpad).
9. Manniledathil Nayar.
10. Alliyil Edathil Nayar.
11. Natuvathedathil Nayar.
12. Mangat Atchen.
13. Thenayancheri Elayad.
14. Thanma Thanma Paniker.
15. Malaproth Paranambi.
16. Parappur Edathil Nayar.
17. Theningal Edathil Nayar.
18. Thrikteeri Nayar.
19. Elampilasherry Nayar.
20. Mannarakat Nayar.
21. Elayat Nayar.
22. Muthuvilat Nayar.
23. Tharakal Menon.
24. Vadakara Muthar.
25. Molanhur Nayar.
26. Mannanur Mutha Nayar.
27. Kundachari Mutha Nayar.
28. Blahayil Nayar.
29. Vakayil Nayar.
30. Ekanath Kammal.
31. Etathara Nayar.
32. Mankara Nayar.
33. Kongattil Nayar.
34. Venmaniyur Nayar.
35. Kappil Nayannampura Thirumulpad.
36. Mandammuyi do.
37. Maprath do.
38. Cheekote do.
39. Narikote Nayar (extinct).

40. Ayayiraprabhu Kartavu (now extinct).
41. Chamet Nayar (extinct).

Tarwads.

(i).

IN NORTH MALABAR.

1. Kunnoth Edathil Nambiyar.
2. Chera Edathil do.
3. Koyukil Edathil do.
4. Pannote Edathil do.
5. Kalliat do.
6. Vengayil Nayanar.
7. Varikara Nayanar.
8. Kappiath Nambiyar.
9. Kayithari Edathil do.
10. Vella Chathoth do.
11. Velluva Puthiaveettil do.
12. Kuttiattur Manikoth do.
13. Pariarath Edavan do.
14. Kayitheri Keloth do.
15. Ayilliath do.
16. Arayath do.
17. Ninkalari do.
18. Aralath do.
19. Chalayil Kandoth do.
20. Mavila Chathoth do.
21. Kuttiyattur Keloth do.
22. Nettur Chathoth do.
23. Kayithari Chandroth do.
24. Nallakandi Koroth do.
25. Kaniri Puthanveettil Nayar.
26. Potharaveettil Etamana Nayar.
27. Kuttiyattur Kunnathveettil Nambiyar.
28. Pattanur Edathil do.
29. Ayikote Mavila Nambiyar.
30. Chalalaveettil do.
31. Kutali Thayathaveettil do.
32. Arathil Kandoth do.
33. Arayadath do.
34. Kurukat Curup.
35. Murchilote Curup.
36. Pulari Curup.
37. Vayoth Kitav.
38. Puthishari Kitav.
39. Kanhirote Kitav.
40. Thachinayinolu.
41. Puliyari Olu.
42. Puthalatholu.
43. Thekedath Nayar.
44. Elamana Nayar.
45. Kayippathur Etam do.
46. Kayipat Kitavu.
47. Manmili Kitavu.
48. Punur Edathil Kitavu.
49. Ponathil Kitavu.
50. Arikara Nayar.
51. Patinhare Edathil Nayar.
52. Thiruvvath Curup.
53. Mankuttil Nayar.
54. Karingattakara Nayar.
55. Vengappalam Nambiyar.
56. Vannathamkandi do.
57. Puliyotath Nayar.
58. Venminiri Kitavu.
59. Kandoth Nayar.

60. Cheriath Nambiyar.
61. Narangappurath Nayar.
62. Panoli Nambiyar.
63. Kottarathil do.

(ii).

IN SOUTH MALABAR.

1. Vatasherry Mannatiar.
2. Thillamannattil.
3. Chempath Mannatiar.
4. PuliankalathMannatiar.
5. Elayat.
6. Kothanath.
7. Kongote.
8. Cappatath.
9. Kenath.
10. Kambaratta.
11. Nydalata.
12. Muriath Variar.
13. Kanhirampatath.
14. Palaprath Nambiyar.
15. Cherukara Nayar.
16. Kolappulli Nayar.
17. Patinharapat Nambiyar.
18. Koyigote Akathat.
19. Ullanat Paniker.
20. Thekini Edath Nayar.
21. Manhalavil Nayar.
22. Muthirakal Paniker.
23. Otuvangat Karuthedath.
24. Korampoyil.
25. Kalavur Nayar.
26. Kalpalli Pilapra.
27. Soothrakil Ellatha.
28. Kuttikat Valloti.
29. Payianat Kunnath Paniker.
30. Kolakkampadath Mannatiar.
31. Punnoli Koroth.
32. Kuttiprath.
33. Kuttichira Nayar.
34. Kuthampalli Nambiar.
35. Thalakappil Nayar.
36. Karampalli Curup.
37. Mundakal Maniledathil.
38. Palakunnath Kolayi.
39. Palakunnath Nangolath.
40. Kolamkolli.
41. Chenmalasherry Aluvingal.
42. Muthakuttil Narrat.
43. Manathanath.
44. Mundakaparambath.
45. Mannathur.
46. Cheruvalath.
47. Palakal.
48. Paravath Mannatiar.
49. Othungote do.
50. Konkalath do.
51. Palamoli Chaliadath.
52. Chathalingath.
53. Karat Panamanna.
54. Kyprath.
55. Kolathur Variar.
56. Nellaya Variar.
57. Katukavil Nedungati.
58. Vayayur Erati.
59. Thachamath Netungati.
60. Athrapatta Karthavu.

NOTE.—*I am indebted to Mr. O. Chandu Menon for the above lists and he assures me that they are as nearly exhaustive as possible.*

APPENDIX V.

Glossary of Terms.

A.

Achan.—*lit*: father—lord. 1. the title of males in the royal family of Palacadu; 2. the minister of the Calicut Rajah, known as *Mangat Achan*; 3. the minister of the Cochin Rajah, known as *Paliyat Achan.*

Anandravan.—*lit*: next relation, successor, heir—applies to a junior in reference to a senior member of a Malabar family.

Arye-kuri-kanam, i. e., Arivu (expense) *kûri* (*pit.*) *kânam, lit*: the expenses of the tenant in improving land which are paid to him on determination of the lease.

Attaladakkam.—*lit*: *attam,* end, and *adakkam,* possession—the right of succession in a branch of the family when the direct stock fails.

Attipet or *Nir-attipet.*—*lit*: that which is obtained completely water and all, *or perhaps* that which is obtained by contact with water. (I prefer the former. The property in the water *Nir-mudal* is the last right parted with.) The outright purchase of the freehold.

C.

Chamayam.—generically the expense of improving land, used specifically for fixtures as opposed to *Kuyikur,* plantations, and *Vettu-kanam,* tillages.

Changati-kuri.—*lit*: a lottery association; a Provident club in which the periodical subscriptions are drawn for by lot and each subscriber in time receives a prize. The early prize-winner thus receives a loan free of interest and repayable by instalments.

Cherikkal.—1. land appropriated for the support of Rajahs and Temples; 2. the name of one of the branches of the Kolattanad family with whom the British made a settlement in 1792.

D.

Deshadikari.—the head man of a village in Malabar.

Devasam.—temple property, a temple.

E.

Embran—or *Embrantiri.*—a class of sacrificing Brahmins, chiefly Tulu Brahmins, who officiate at Sudra ceremonies.

Enak—or *Inak.*—*lit :* agreement; a certificate from mortgagor to mortgagee, or *vice versâ* announcing the transfer of his interest in the property.

I.

Illam.—a Brahmin's house, also called a *Mana.*

J.

Jenm.—or *Janmam.*—1. birth, birthright, hereditary proprietorship; 2. freehold property which it was considered disgraceful to alienate.

Jenm-panayam.—one of the higher forms of mortgage by virtue of which the proprietor parts with nearly all his proprietary interest.

K.

Kaimâl.—a Nayar chief; applied as a honorific term by lower castes to Nayars.

Kaividu Otti.—a tenure higher than *Otti* which leaves to the *Jenmi* merely nominal rights.

Kalyâna-kûri.—a marriage or other entertainment to which the guests invited are expected to subscribe according to their means.

Kânam.—*lit :* possession, a mortgage with possession.

Kânam-pâttam.—the rent payable by a *Kanamkar;* does not usually exceed one-third of the net produce, opposed to *Verumpattam,* which is generally at least two-thirds.

Kâraima.—the office of *Karalan* or temple servant, freehold.

Kâraimkari.—a perpetual lease of land at a fixed rent.

Karnavan—*Karnavati*—head of family, applied to a senior in relation to a junior member.

Kattakânam.—the right of breaking the ground.

Kollam.—contraction for Kô-vil-agam : 1. the king's palace; 2. the Malabar year. The era commenced in A.D. 824 when the Kolla Swarupam or Kola dynasty revived.

Kûdiân.—a cultivating tenant.

Kûdima-jenm.—a tenure under which a nominal quit-rent only is paid.

Kudimanír=Nirmudal.—a tenure almost equivalent to freehold. The proprietor loses his right of redemption, but retains a right of pre-emption if the tenant wishes to part with his interest.

Kudiyirup.—1. a dwelling house; 2. a lease of a house site for which the tenant pays two fanams yearly and is entitled to compensation if evicted.

Kûri.—See *Changati-kuri.*

Kûri-kânam.—(*Kûri,* a pit.) 1. a mortgage of land for the purpose of bringing it under cultivation; 2. money payable to a tenant for improvements made.

Kûrikûr.—(*Kûri*-pit, *kûr*-share) the share to which the tenant is entitled for digging pits and planting trees.

Kûrvaycha.—the rank of second, third, &c. prince in a royal family.

M.

Makkatayam.—the right of sons to inherit as distinguished from *Marumakkatayam,* the right of sisters' sons.

Mâlikâna.—what is due to the *Malik* or proprietor when set aside from the management of his estates. Annual allowance to deposed Rajahs.

Marumakkatayam.—the right of sisters' sons to inherit as distinguished from *Makkatayam,* the right of sons.

Mêlkânam.—a mortgage over and above the first mortgage; a second mortgage to a third party.

Mêlkóyima.—*lit:* upper sovereignty, the right of the sovereign over temples.

Mopla—or *Mappilla.*—1. a bridegroom, son-in-law; 2. the name given to Mahomedan, Christian and Jewish colonists in Malabar who intermarried with the natives of the country, now confined to Mahomedans.

Mudal Sambandham.—community of property as opposed to community of pollution (*Pula Sambandam*).

Mûnpâttam.—a lease where rent is paid in advance.

N.

Nâduvari.—the chief of a *Nâd* or province, who had 100 Nayars under his command.

Nambidi.—an inferior class of Brahmins.

Nambudri—or *Nambutiri.*—the name given to the superior Brahmins in Malabar.

Nâyar.—1. usually supposed to be identical with *Nâyakan*, a leader. 2. the Sudras of Malabar.

Nîrmudal.—*lit:* the property in water=*Kûdima Nîr. q. v.*

O.

Onam.—the national feast on the new moon of September lasting ten days, when Parusurama is still said to visit Kêrala.

Oppu.—1. signature; 2. the fee given to the *Jenmi* for signing the document.

Otti.—1. a pawn; 2. a usufructuary mortgage in which the usufruct extinguishes the interest.

Ottikumpuram.—a tenure higher than *Otti* which leaves to the *Jenmi* merely nominal rights.

P.

Palishamadaku.—(*Palisha,* interest—*Madaku,* returned) exactly equivalent to an *Otti.*

Panayam.—a pledge or pawn—when used of land, if usufructuary, it is generally called *Kari-panayam* or *Koyu-panayam:* if hypothecatory, *Todû-panayam* or *Ohundi-panayam.*

Paramba.—1. dry land as opposed to wet-land, may be gradually converted into a *Palliyal* and thence into a *Nilam* or rice field; 2. a garden of cocoanut and other trees which may contain a dwelling house.

Pâttam—perhaps=*Pati-varam,* the share of the *pâd* or overlord, the proportion of the net produce paid to the proprietor; by the tenant after deducting estimated quantity of seed and an equal quantity for cultivation expenses.

Peruvartham—(*Peru,* to obtain: *artham,* gain) a kind of conditional sale in which the transferor reserves the right of re-purchase. If he exercises this right, he must pay the full market value at the time of re-purchase.

Polichheluttu—*lit:* to tear up a writing: 1. renewal of a lease; 2. fee paid to proprietor on the occasion.

Porappâd or *Purappad.*—the net produce or net rent payable to the *Jenmi* after deducting interest or advances made by the tenant and the Government tax (*Nigudi*).

Pula Sambandham.—community of pollution as opposed to community of property (*Mudal Sambandham*).

Purangkadam.—an additional loan, usually following on a *kânam.*

S.

Sâkshi.—*lit*: witness; a forfeit of 10 to 20 per cent. on money advanced when the mortgagee wishes to surrender before the expiry of his term.

Samudayam.—1. a council of Brahmins; a committee for managing common property or the concerns of a temple; 2. the office of one who manages the affairs of a temple on behalf of the *Uralans.*

Santathi Brahmasam.—a gift to a Brahmin with the right of perpetual enjoyment to him and his descendants.

Sarvasadanam.—*lit*: the gift of the whole property; a transfer of property to a son-in-law in a Nambudri family in trust for the issue of his marriage.

Sâsvatam.—perpetual—used of a perpetual lease.

Shânti.—the office of priest in a temple.

Srarupam.—a dynasty, usually confined to the four principal dynasties termed the *Kolla, Nediyirup, Perimpatap* and *Tripa Swarupams* represented by the Kolattiri, Zamorin, Cochin and Travancore Rajahs.

Sthânam.—a station, rank or dignity.

T.

Talapâttam.—a lease where head money is paid in advance.

Tamburan—*Tamburatti.*—the title given to the males and females in a Royal family.

Tamudri.—the sea king or ruler of Calicut, commonly called *Zamorin.*

Tarwad.—or *Tara-vadu* or *Tara-pâdu*—perhaps one of the heads (*pâds*) in the Sudra village (*tara*). Hence the place of abode of such house holder; the joint family as opposed to the village community.

Tavarai.—*lit*: relationship by the mother's side, a branch of a *Tarwâd* which has separated more or less from the parent stock.

Tiyan.—an islander; the caste of those who cultivate the palm, supposed to have come from Ceylon.

Tirumulpad.—a member of a Royal family.

U.

Ubhaya-pâttam.—*lit:* a lease of rice fields in South Malabar only.

Undaruthi panayam.—a mortgage which eats itself up, the usufruct extinguishing both principal and interest within a fixed period.

Uraima.—the office of an *Uralan.*

Uralan.—1. the representatives of villages, part of whose duty it was to manage the village temples; 2. the founders or managers of temples.

V.

Veppu.—a deposit; exactly equivalent to an *Otti.*

Verumpâttam.—*lit:* bare rent; a simple lease, but usually so arranged as to leave a bare subsistence to the tenant.

Vettu-kânam.—compensation payable to a tenant for clearing and levelling land, or in other words for tillages.

Vishu.—the national feast of the vernal Equinox on 1st Medom=10th April, on which day annual fees are presented.

Vyavahara Samudra.—*lit:* the sea of law suits, the title of a poetical treatise on Malabar law.

Z.

Zamorin.—see Tamudri.